Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

THE CITY OF LOS ANGELES,

Petitioner,

v.

SYED MOUZZAM ALI,

Respondent.

On Petition For A Writ Of Certiorari To The California Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the California Court of Appeal erred in holding that a city requirement that a landowner complete a land use development approval process by itself constitutes a compensable "temporary" regulatory taking under the Fifth Amendment?

Whether the California Court of Appeal erred by holding that a land-use regulation that violates state law effects a temporary taking of property on that basis alone?

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CITATIONS TO OPINIONS BELOW

The decision of the California Court of Appeal was filed on December 28, 1999 and is reported at 77 Cal. App. 4th 246, 91 Cal.Rptr. 2d 458 (1999). Appendix A.

JURISDICTION

The decision of the California Court of Appeal was entered on December 28, 1999. App. A. The City filed a Petition for Rehearing. App. K. It was denied. App. E. A Petition for Review was filed with the California Supreme Court. App. J. The order of the California Supreme Court denying a petition for review was entered on March 29, 2000. App. F. The Petition for Writ of Certiorari is timely filed in accordance with Rule 13.1 of the Rules of this Court.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment V, provides in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Constitution of the United States, Amendment XIV, § 1, provides in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Civil Code § 7060 provides:

> § 7060. Prohibition against compelling owner to lease accommodations.
>
> (a) No public entity, as defined in Section 811.2, shall, by statute, ordinance, or regulation, or by administrative action implementing any statute, ordinance or regulation, compel the owner of any residential real property to offer, or to continue to offer, accommodations in the property for rent or lease.
>
> (b) For the purposes of this chapter, "accommodations" means the following:
>
> > (1) The residential rental units in any detached physical structure containing four or more residential rental units.
> >
> > (2) With respect to a detached physical structure containing three or fewer residential rental units, the residential rental units in that structure and in any other structure located on the same parcel of land, including any detached physical structure specified in subparagraph (1).

Ordinance No. 164,175 of the City of Los Angeles, known as the "SRO Ordinance" is printed in Appendix I.

STATEMENT OF THE CASE

A. The SRO Ordinance And Its Administrative Relief Provisions.

In order to preserve the stock of low cost housing, the City of Los Angeles (City) adopted Ordinance No. 164,175 which placed a moratorium on issuing demolition permits for single room occupancy (SRO) hotels. App. I.

Section 1 of the Ordinance defined an SRO hotel as one where 30% or more of the dwelling units "do not contain a private bath and toilet facility within the unit."

Section 2 provided an exception if it is determined that "such building is infeasible to repair."

Section 3 provided that the City Council could grant a hardship exemption from the provisions of the ordinance "in cases of extreme hardship duly established to the satisfaction of the City Council."

Section 3 also provided that applications for a hardship exemption were to be filed with the Rent Stabilization Division of the Community Development Department.

Barbara Zeidman (Zeidman) was the Director of the Rent Stabilization Division from 1984 through late 1990. Her agency was responsible for implementing all aspects of the SRO Ordinance, including investigating both hardship applications and appeals by landowners protesting a SRO designation for their buildings. (RT, 402:25-405:6; JA, XIII, p. 3702, ¶¶ 2 and 3.)

B. The Enforcement Of The SRO Ordinance In This Case.

On November 17, 1988, the Ferraro Hotel was the scene of a major alarm fire, which resulted in substantial property damage and rendered the structure uninhabitable. (JA, XIV, p. 3741, ¶ 5.) Inspectors from the City's Department of Building and Safety conducted an inspection of the property the same day (RT, 523:20-525:20) to determine whether the premises were safe for entry or occupancy. (RT, 526:1-6.) After the inspection, Orders to Comply were posted on the property ordering, *inter alia*, that the building be vacated and the premises secured until all necessary repairs were performed. (JE 2 and 3.)

On December 16, 1988, Syed Mouzzam Ali (Ali) entered into an agreement with Fred Harouni to sell the Ferraro Hotel. (JE 135.) The sales agreement was handwritten by Fred Harouni and required that the property be demolished. (RT, 254:4-9.)

On January 19, 1989, Ali applied for a demolition permit. (JE 55-5; RT, 84:17-28.) Based upon information provided by Ali, Paul Wong, the supervising engineer of the Structural Plan Check Division of the Department of Building and Safety, believed that the Ferraro Hotel could be an SRO hotel and as such subject to a moratorium on the demolition of such buildings. (JA, XIII, p. 3626, ¶¶ 2-6.) Based upon this information, he advised the plan checker assigned to the application, Gene Edwards, that the Ferraro Hotel might be an SRO hotel. (Edwards Deposition, 15:2-24.)

Because there was insufficient information to reach a final determination on this matter, Edwards wrote corrections requiring compliance with the SRO Ordinance in order to gather additional information. (*Id.* at 19:6-14; 44:18-25; 47:23-48:3.) Subsequently, on February 28, 1989, Edwards met with Ali to discuss these corrections. (*Id.* at 53:11-54:7.)

Soon thereafter, Barbara Zeidman and members of her staff spent time with Ali explaining the hardship exemption process. (JA, XIII, p. 3703, ¶ 5.) Zeidman had several phone discussions with Ali concerning the Ferraro Hotel in the spring of 1989. (RT, 390:28-391:10; JA, XIII, p. 3703, ¶ 6.) They discussed a hardship exemption for the hotel and Zeidman mailed him an application. (RT, 405:27-405:19; JA, XIII, p. 3703, ¶ 6.) Ali did not file this application. (RT, 405:20-21; JA, XIII, p. 3703, ¶ 6.) At no time during these conversations did Ali state or imply that the Ferraro Hotel was not an SRO hotel. (RT, 406:2-5; JA, XIII, p. 3703, ¶ 6.)

On August 8, 1989, based upon the hazardous condition at the Ferraro Hotel, the City Council adopted a motion, to authorize the Department of Building and Safety to hire a private security company to provide a 24-hour armed fire watch service for the Ferraro Hotel. (JE 17.)

C. The Judgment In *Ali I* Causes Plaintiff To Seek Administrative Relief.

Instead of seeking administrative relief, Ali filed a petition for a writ of mandate in the Superior Court on September 6, 1989, *Ali v. City of Los Angeles* (C736585)

[hereafter *Ali I*], alleging that he had applied for a demolition permit for the Ferraro Hotel; that the hotel was not an SRO hotel within the definition of the SRO Ordinance; and that the SRO Ordinance violated the Ellis Act, Govt. Code § 7060, et seq. App. K at App. 90-96.

The Ellis Act is a general state law adopted in response to the California Supreme Court decision in *Nash v. City of Santa Monica*, 37 Cal.3d 97, 207 Cal.Rptr. 285, 688 P.2d 894 (1984). That case upheld a local ordinance designed to preserve the limited supply of rental housing units in a community by preventing their removal from the rental housing market.

In response, the California Legislature enacted the Ellis Act (Government Code § 7060) which provided that "[n]o public entity . . . shall, . . . compel the owner of any residential real property to offer, or continue to offer, accommodations in the property for rent or lease."

In its demurrer in *Ali I*, the City argued that the Ellis Act did not prohibit a municipality from enacting an ordinance regulating the issuance of demolition permits. The City argued that Ellis Act only prohibits a public entity from compelling the owner of residential real property to offer the property for rent or lease, and that the SRO Ordinance did not compel Ali to offer his property for rent or lease. Therefore, the SRO Ordinance as applied to Ali did not run contrary to the Ellis Act. App. K at App. 110.

The City also argued that any determination by the city staff was administratively appealable and that this right of appeal would include a determination of whether the building is or is not a SRO hotel subject to the provisions of the SRO Ordinance. App. K at App. 106.

The trial judge accepted the City's legal arguments, and ruled that Ali was required to continue with the development approval process and obtain a final decision on his permit application. App. H. Ali did not appeal that judgment.

D. The City Reaches A Final Decision To Issue The Demolition Permit And Ali Sells The Property.

After losing in *Ali I*, Ali retained a new attorney and finally sought administrative relief from the City. (JE 184.) Hearings were held on May 31, 1990, before the Building Department's Advisory Appeals Board and on June 12, 1990, before the Board of Building and Safety Commissioners. (JA, XIV, p. 3745, ¶¶ 36 and 37.)

During the hearings there was evidence presented that each room at the Ferraro Hotel had a bath. (RT, 407:1-5.) This new information brought into question whether the Ferraro Hotel was properly classified as an SRO hotel. (RT, 407:15-21.)

Further Ali's new attorney provided Zeidman with new information regarding the Ferraro Hotel. (RT, 407:21-26.) Ali's attorney provided Zeidman with an appraisal of the Ferraro Hotel and a contract with the State of California to house parolees at the hotel which showed that each room had a bath. (JE 112, pp. 2-3; 124; RT, 411:20-412:15.)

Based upon this new information, Zeidman concluded that the Ferraro Hotel was not an SRO hotel. On August 1, 1990, she wrote Ali's attorney informing him of

that fact. (JE 199.) She also sent an interoffice memorandum to the Building Department with the same information on August 2, 1990. (JE 36a-36b.) A second memorandum was sent to the Building Department stating that her agency did not object to the issuance of a demolition permit for the Ferraro Hotel. (JE 201.)

A demolition permit was issued on August 8, 1990, (JA, XIV, p. 3745, ¶ 41) and demolition of the Ferraro Hotel started the next day. (JA, XIV, p. 3756, ¶ 42.)

Ali did sell to his original intended purchaser. (JE 135.) A four story mixed-use building was built on the site, with retail on the first floor, commercial uses on the second floor, and 32 residential units on the top two floors. (RT, 281:12-28.)

E. Proceedings In *Ali II* Relating To The Assessment Lien.

Ali filed another lawsuit against the City on August 15, 1990 (*Ali II*). The first cause of action sought to reverse the City's determination to impose lien assessments for the costs of the fire watch at the Ferraro Hotel. (JA, I, pp. 17-40.)

On May 9, 1995, in an unpublished opinion in case number B 077712, the California Court of Appeal reversed the trial court's denial of the Writ of Mandate and remanded the case for further proceedings. App. G.

F. Trial in *Ali II* And The California Courts Finding of a Temporary Regulatory Taking.

On November 20, 1995, leave was granted to Ali to file Second Amended Complaint. App. N.

The trial court bifurcated the proceedings, and first considered whether there had been a taking of property for which just compensation was required to be paid. The issue of damages and the trial on the cause of action for alleged deprivation of civil rights were left to a second phase. A jury was waived by both parties. (JA, XIII, p. 3612.)

On March 19, 1997, the trial on the takings claim commenced before Judge Lawrence Crispo. (JA, XIV, p. 3748.)

On April 9, 1997, the court ruled that the delay in issuing of the demolition permit for the Ferraro Hotel constituted a regulatory taking. App. D. Plaintiff argued that the decision in *Agins v. Tiburon,* 447 U.S. 255 (1980) was controlling. App. M.

Judge Crispo purported to apply these standards. He found as an historical fact that due to a misclassification of the property as a SRO hotel there was a delay in the issuance of a demolition permit between January 1989 and August 1990. Judge Crispo stated that: "The City's initial designation of the Ferraro as an SRO was erroneous. The SRO ordinance prevented the immediate demolition of the Ferraro. . . . " (JA, XIV, p. 3829.)

He also ruled that the City's action placing a fire watch at the Ferraro Hotel constituted a physical taking. (JA, XIV, p. 3830.)

On May 1, 1997, the court issued its ruling on Ali's due process claims. App. C. The court ruled that the City had given plaintiff notice and an opportunity to be heard and, thus, his procedural due process rights were not violated. (JA, XIV, p. 3896.) The Court also found that plaintiff's substantive due process rights were not violated. *Id.* Judge Crispo made the following findings about the character of the City's actions:

> "[T]he City's actions were not oppressive nor do they shock the conscience. While the actions of the City's employees were negligently performed, there is no credible evidence that they deliberately sought to deprive Mr. Ali of his due process rights. On the contrary, the court finds that they acted in good faith. Finally, the City's action, though misguided, was an attempt to further legitimate interests in protecting both its zoning integrity and the public." (JA, XIV, p. 3896.)

The trial court awarded damages for the taking in the amount of $1,199,237.00. The judgment entered also incorporated the findings relating to the retrial of the mandate proceedings on to the assessment liens. App. B.

Both the City and Ali appealed.

On December 28, 1999, the California Court of Appeal Division Four of the Second Appellate District issued an opinion affirming the Superior Court's determination that there had been a regulatory taking. App. A.

The Court of Appeal stated:

> "We conclude that the judgment in favor of Ali in inverse condemnation should be affirmed on the ground that the City's wrongful denial of a

demolition permit between January 1989 and August 1990 in violation of the Ellis Act effected a temporary regulatory taking of Ali's property." App. A at App. 4.

REASONS FOR GRANTING THE WRIT

The opinion of the California Court of Appeal deals with an issue of federal constitutional law in a way which substantively conflicts with decisions of this Court and therefore warrants review in the form of a writ of certiorari. See Rule 10(c) of the Rules of the Supreme Court of the United States.

The decision of the California Court of Appeals represents a radical expansion of regulatory takings doctrine that would impose enormous new financial liabilities on taxpayers across the country and seriously interfere with essential municipal land use regulatory functions. *Cf. Eastern Enterprises v. Apfel*, 524 U.S. 498, 542 (1998) (Kennedy, J., concurring and dissenting) (rejecting possible interpretation of the takings clause because it "would throw one of the most difficult and litigated areas of the law into confusion, subjecting States and municipalities to the potential of new and unforeseen claims in vast amounts").

As witnessed by the opinion of the California Court of Appeal, there is considerable confusion as to what constitutes a temporary regulatory taking. See *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 701 (1999) (Kennedy, J.) (observing that the court has

not yet provided a "definitive statement of the elements of a claim for a temporary regulatory taking").

Some of this confusion is due to this Court's holding in *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987) (*First English*) which has been interpreted by California Court of Appeal as standing for the proposition that a right to just compensation arises if a landowner can demonstrate that a government mistake during the permit approval process delayed the grant of a development permit.

Other precedent of this Court including *Agins v. Tiburon*, 447 U.S. 255 (1980) belies such a notion. Nevertheless, the City of Los Angeles has, as other jurisdictions undoubtedly will, fallen victim to judicial misunderstanding about regulatory takings.

Further, the California Court of Appeal has determined that a violation of state law can give rise to a compensable taking on that basis alone. To the extent that this is a case of first impression, review is also appropriate on the ground that the California Court of Appeal has decided an important question of federal constitutional law that has not been, but should be, settled by the Supreme Court of the United States. See Rule 10(c) of the Rules of the Supreme Court of the United States.

The potential liability of local governments will be substantially increased if the California Court of Appeal's theory of liability is left unchallenged. State law violations will become federal constitutional torts. Land-use decisionmaking bodies will be hesitant to grant administrative relief from interlocutory decisions for fear that an

admission of error or mistake, will give rise to claims for payment of just compensation.

A. A Delay Due to Mistakes Made During The Development Approval Process Does Not Constitute A Temporary Taking of Property.

This Court has said that the

> "mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking. [Citation.] The reasons are obvious. A requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself 'take' the property in any sense: after all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired."

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 126-127 (1985).

This point was emphasized by the Court in *Agins v. City of Tiburon*, 447 U.S. 225 (1980). In that case, the City of Tiburon had begun and then abandoned condemnation proceedings against plaintiffs' property. The plaintiffs argued "that the city's aborted attempt to acquire the land through eminent domain had destroyed the use of the land during the pendency of the condemnation proceedings." *Agins*, 447 U.S. at 258 n.3. This Court rejected the plaintiffs' claim, stating:

> "The State Supreme Court correctly rejected the contention that the municipality's good faith planning activities, which did not result in the successful prosecution of an eminent domain

> claim, so burdened the appellants' enjoyment of their property so as to constitute a taking. (Citations) Even if the appellants' ability to sell their property was limited during the pendency of the condemnation proceeding, the appellants were free to sell or develop their property when the proceedings ended. Mere fluctuations in value during the process of governmental decision making, absent extraordinary delay, are 'incidents of ownership. They cannot be considered as a "taking" in the constitutional sense.' "

447 U.S. at 263 n.9 (citations omitted) quoting *Danforth v. United States*, 308 U.S. 271, 285 (1939).

In the present case the SRO Ordinance did not prohibit Ali from obtaining a demolition permit. To the contrary, it established the procedures that enabled Ali to obtain the demolition permit which he sought. Ali could have obtained a final decision on his permit request at any time. He was counseled about the administrative relief procedures very early in the development approval process.

Further, the City successfully defended the need for Ali to utilize these procedures in *Ali I*. Plaintiff did not appeal the judgment in that case. By failing to appeal the adverse judgment in *Ali I*, plaintiff is not entitled to attack the City for requiring him to follow the established procedures for obtaining a final decision on a demolition permit application. See *Mola Development Corporation v. City of Seal Beach*, 57 Cal.App. 4th 405, 413, 67 Cal.Rptr. 2d 103 (1997).

Ali is in the same position as the landowners in *Agins*. He is a landowner whose use of property was

restricted during the City's decisionmaking process. However, once a final decision was reached he was free to put his property to a productive use. Ali did not challenge the City's final decision as depriving of an economically viable use of his property. After Ali had sought and obtained administrative relief with respect to the SRO Ordinance, he was free to use the site as he desired. Although there was a delay in the sale of his property to Harouni, Ali did sell to the original purchaser. The final sales price was $2,350,000.00 (RT, 69:8-20), not the $2,700,000.00 stated in the original sales contract. (JE 135.) However, Davis Harouni, the son of the purchaser, testified that the price reduction was caused by three factors: (1) change in the market, (2) street dedication requirements in existence, but not taken into consideration at the time of the orginal contract in 1988, decreased the buildable area of the parcel, thus reducing its value, and (3) changes in the City's parking requirements reduced the size of the project.

As noted by the Court in *Agins* " . . . [m]ere fluctuations in value during the process of governmental decision making, absent extraordinary delay, are 'incidents of ownership. They cannot be considered as "taking" in the constitutional sense.' [Citations]." (*Agins v. Tiburon, supra,* 447 U.S. at p. 263 n.9.)

The holding in *First English* does not support the California Court of Appeal's concern about delay during the development approval process.

The California Court of Appeal concluded that *First English* applied in a situation wherein the landowner had obtained requested permits, but could point to mistakes

made during the approval process which delayed the landowner's receipt of the final development approval.

The California Court of Appeal stated that:

> "The court in *First English* indicated two circumstances in which such a temporary denial of all use of the property would not require compensation: . . . the temporary deprivation was merely a normal delay in the permissible regulation of development. (482 U.S. at p. 321 [not deciding 'the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like'.]") App. A at App. 7-8.

The California Court of Appeal then focused on Ali's argument about the state law violation and concluded that " . . . the delay in demolition caused by the erroneous enforcement of the SRO ordinance despite the prohibitions of the Ellis Act was not a 'normal' delay in the development process. Because the delay temporarily deprived Ali of all use of his property and was not a normal delay in the development process, it was a temporary regulatory taking which required compensation under *First English.*" App. A at App. 14.

The California Court of Appeal's analysis of *First English* is wrong in a number of respects. *First English* does not explain what kinds of government action constitute a compensable taking of property. The question presented to this Court in *First English* related only to the remedy available once a taking had been proven. The plaintiff in that case sought "damages for the uncompensated taking of all use" of the property based on an

ordinance which prevented construction in the flood plain. The Court stated explicitly that it was not addressing whether the ordinance constituted a taking. See, 482 U.S. 313. ("We accordingly have no occasion to decide whether the ordinance at issue actually denied appellant all use of its property. . . . ").

The Court in *First English* was addressing the question that arises once there has been a judicial declaration that an ordinance has effectuated a taking and the government then elects to discontinue the regulation. At that point the issue becomes "whether abandonment [of that taking] by the government requires payment of compensation for the period of time during which regulations deny a landowner all use of his land." *Id.* at 318.

With respect to that issue this Court stated that, "[i]nvalidation of the ordinance or its successor ordinance after this period of time, though converting the taking into a 'temporary' one, is not a sufficient remedy to meet the demands of the Just Compensation Clause." *Id.* at 319.

Therefore a "temporary taking" occurs only after a court invalidates a final decision as imposing excessive restrictions on the use of land and that invalidation results in the government agency abandoning the disputed regulatory measure. In the present case Ali was not seeking to have the City abandon a disputed regulatory measure. That had already happened before Ali filed the current action. Ali just sought damages. As the above discussion makes clear, a landowner may not seek damages for a temporary taking in the first instance. Absent a request for relief from an adverse final decision, a claim for a temporary taking does not exist.

B. A Land-Use Regulation That Violates State Law Cannot Effect A Regulatory Taking of Property On That Basis Alone.

The mere fact that there was a violation of state law during the development approval process does not rise to a regulatory taking on that basis alone. In fact such a theory of recovery is inconsistent with the basic principles surrounding the Takings Clause.

The purpose of the Fifth Amendment Takings Clause is to deal with the situation where government action forces some private persons alone to shoulder public burdens, "which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

However, a takings claim always presumes that the government has a legitimate "basis" for its action; otherwise the governmental act is ultra vires and void. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

The Takings Clause "does not prohibit the taking of private property, but instead places a condition on the exercise of that power. * * * It is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking." *First English*, 482 U.S. 314-315.

The need for an "otherwise proper" regulatory measure is inconsistent with the California Court of Appeal's conclusion that a violation of state law constitutes a compensable taking on that basis alone. See John D. Echeverria, *Does a Regulation That Fails to Advance a Legitimate*

Governmental Interest Result in a Regulatory Taking, 29 Envtl. L. 853 (1999); and Matthew D. Zinn, *Ultra Vires Takings*, 97 Mich.L.Rev. 245 (1998).

As Justice Kennedy has observed, the Takings Clause "operates as a conditional limitation, permitting the Government to do what it wants so long as its pays the charge. The Clause presupposes what the Government intends to do is otherwise constitutional . . . " *Eastern Enterprises v. Apfel*, 524 U.S. 498, 545 (1998) (Kennedy, J., concurring in the judgment and dissenting in part).

The United States Court of Appeals for the Fifth Circuit recently made the following observation about this issue saying that

> " . . . the question of whether governmental action undertaken without authority, e.g., a taking of private property for private use, is properly considered a violation of the Takings Clause or the Due Process Clause (or both) has not been definitively answered. Citation. Five Justices recently suggested that the Takings Clause presupposes legitimate government action, see Eastern Eneters. v. Apfel, 524 U.S. 498, 545 (1998) (Kennedy, J., concurring in judgment and dissenting in part) ("The [Takings Clause presupposes what the government intends to do is otherwise constitutional. . . . "); id. at 554 (Breyer, J., dissenting) ("As [the Takings Clause] language suggests, at the heart of the Clause lies a concern, not with preventing arbitrary or unfair government action, but with providing compensation for legitimate government action that takes 'private property' to serve the 'public' good.") . . . ".

The John Corporation v. The City of Houston, 2000 U.S. App. LEXIS 13530 n.9 (2000).

However, it is clear that the California Court of Appeal views the Takings Clause as being concerned with punishing government action which it determines violates state law. Nothing in this Court's precedent suggests that the Takings Clause is to be used to punish state law violations.

CONCLUSION

For these and all the above reasons the petition for a writ of certiorari should be granted.

Dated: June 26, 2000

Respectfully submitted,

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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

SYED MOUZZAM ALI, Plaintiff and Appellant. v. CITY OF LOS ANGELES, Defendant and Appellant.	B114226 (Super. Ct. No. BC008240) (Filed Dec. 28, 1999)

APPEALS from a judgment of the Superior Court of Los Angeles County, Lawrence W. Crispo, Judge. Affirmed.

Law Offices of Rosario Perry, Rosario Perry, and Marie E. Berglund for Plaintiff and Appellant.

James K. Hahn, City Attorney, Claudia McGee Henry, Senior Assistant City Attorney, and Michael L. Klekner, Deputy City Attorney, for Defendant and Appellant.

INTRODUCTION

The City of Los Angeles (the City) appeals from a judgment in inverse condemnation in favor of Syed Mouzzam Ali (Ali).

The essential facts and procedural background are as follows: when Ali's hotel, the Ferraro, was substantially

destroyed by fire in November 1988, Ali desired to demolish it and sell the land. He applied for a demolition permit in January 1989. The City withheld the permit because officials believed the Ferraro was a single room occupancy (SRO) hotel, and the City had an ordinance prohibiting demolition of such low income housing unless (1) it was infeasible to repair, or (2) the owner agreed to replace it with similar housing, or (3) the owner established extreme hardship for an exemption. Eventually, but not until August 1990, the City determined the Ferraro was not an SRO hotel and permitted its demolition. In the meantime, however, commencing in July 1989 a series of fires occurred in the abandoned building, the City determined that Ali was not providing adequate security, and the City contracted for 24-hour security with the costs assessed against Ali pursuant to an ordinance.

Ali filed an action against the City which in part sought a writ of mandate (Code Civ. Proc., § 1094.5) to set aside the assessments on the ground that the delay in issuance of the demolition permit was unlawful, and if the City had promptly issued the demolition permit Ali would have promptly demolished the building, and the security measures would never have been necessary. On a prior appeal in this case we held that the delay in issuing the demolition permit based on the SRO ordinance violated the Ellis Act, Government Code section 7060, subdivision (a), which provides that no public entity may compel the owner of any residential real property to offer or to continue to offer accommodations in the property for rent or lease. (*Ali v. City of Los Angeles* (May 9, 1995) B077712, unpublished opinion.) We said that Ali would be entitled to vacate all or a portion of the assessments if

he could prove that he would and could have complied with all legitimate conditions of a demolition permit and would have demolished the building before the need for security measures arose. We remanded the matter for a trial of that issue. The remand left open, pursuant to the parties' stipulation and the trial court's discretion concerning proposed amendments to the complaint, whether additional causes of action might be tried. The present appeal arises from the proceedings following the first appeal.

In bifurcated proceedings, the writ of mandate was tried first by Judge O'Brien. Judge O'Brien found wholly in Ali's favor on this cause of action. In accordance with our prior opinion, Judge O'Brien ruled that the delay in issuing the demolition permit from January 19, 1989, through August 1, 1990, violated the Ellis Act. Judge O'Brien found factually that the delay was due solely to the actions of the City and that had the permit been issued without delay Ali would have demolished the building before the need ever arose for the security measures assessed against Ali. He ruled that all the assessments be set aside and refunded to Ali ($399,000 plus interest), and that "Any subsequent judgment on the remaining causes of action will incorporate this Statement of Decision and the granting of the Petition for Writ of Administrative Mandate." The subsequent judgment so provided. The City *does not appeal from* the portion of the judgment granting the writ of mandate setting aside and refunding the assessments.

The remaining issues were tried by Judge Crispo. On Ali's cause of action for inverse condemnation Judge Crispo ruled for Ali. He ruled that the City had taken

Ali's property in two ways, a regulatory taking and a physical taking. He found that the delay in issuing the demolition permit was a *regulatory* taking of Ali's property because demolition was the only economically viable option for use of the land; the delay thus deprived Ali of the only economically viable use of his property. Judge Crispo also found that the posting of security guards by the City was a *physical* taking of Ali's property. He ruled that this taking could not be justified based on the health and safety concerns which prompted the City, because those problems were created by the City's own unlawful conduct in delaying the demolition permit. The parties stipulated as to damages, and the judgment awards Ali $1,199,237 plus interest for inverse condemnation.The City appeals from this portion of the judgment.[1]

We conclude that the judgment in favor of Ali in inverse condemnation should be affirmed on the ground that the City's wrongful denial of a demolition permit between January 1989 and August 1990 in violation of the Ellis Act effected a temporary regulatory taking of Ali's property. This conclusion renders moot whether there was a temporary physical taking during a portion of the same time period or whether the same conduct should be characterized as a violation of Ali's federal civil rights.

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[1] Judge Crispo ruled, on the other hand, that the actions of the City did not additionally violate the federal Civil Rights Act, 42 United States Code section 1983. Ali cross-appeals from the portion of the judgment which rejected Ali's cause of action under the federal Civil Rights Act.

STANDARD OF REVIEW

Whether the actions of the City constituted a taking of Ali's property is a mixed question of law and fact. (See *Healing v. California Coastal Com.* (1994) 22 Cal.App.4th 1158, 1170; *Aaron v. City of Los Angeles* (1974) 40 Cal.App.3d 471, 484.) Our review is neither entirely de novo, as contended by the City, nor entirely limited by the substantial evidence rule, as contended by Ali. (*Board of Administration v. Wilson* (1997) 52 Cal.App.4th 1109, 1127-1130.) Mixed questions of law and fact involve three steps: (1) the determination of the historical facts – what happened; (2) selection of the applicable legal principles; and (3) application of those legal principles to the facts. The first step involves factual questions exclusively for the trial court to determine; these are subject to substantial evidence review; the appellate court must view the evidence in the light most favorable to the judgment and the findings, express or implied, of the trial court. (*Board of Administration v. Wilson, supra,* 52 Cal.App.4th at p. 1129; *Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 801; *Patrick Media Group, Inc. v. California Coastal Com.* (1992) 9 Cal.App.4th 592, 605.) Thus, contrary to the City's argument, we do not apply de novo review to all factual findings underlying the trial court's judgment. (*Board of Administration v. Wilson, supra,* 52 Cal.App.4th at pp. 1129-1130.) Only the second and third steps involve questions of law for our de novo review. (*Ghirardo v. Antonioli, supra,* 8 Cal.4th at pp. 800-801; *Board of Administration v. Wilson, supra,* 52 Cal.App.4th at pp. 1129-1130.)

DISCUSSION

In *First English Evangelical Lutheran Church v. Los Angeles County* (1987) 482 U.S. 304 (hereafter *First English*),[2] the Supreme Court indicated that a governmental regulation which *deprives a landowner of all economically viable use of the land* may constitute a regulatory taking of property which requires just compensation under federal constitutional law. (*Id.* at pp. 312-313.) This is consistent with the United States Supreme Court's pronouncements both before and after First English. (See *Agins v. City of Tiburon* (1980) 447 U.S. 255, 260 [ordinance allowed some development and therefore did not constitute a denial of all economically viable use; includes statement that a zoning law which "denies an owner economically viable use of his land" would constitute a taking]; *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1009, 1015-1018, 1020, 1022-1030 [statute prohibited all development of beachfront property and trial court found this rendered property valueless; held this constituted a taking; exception for traditional exercise of police power to prevent "noxious uses" or "nuisance" did not apply, because under the circumstances the statute simply required property to remain undeveloped in order to promote a general societal interest].)

The main significance of *First English* is its holding that a *temporary* regulatory taking consisting of the temporary deprivation of all economically viable use of the property may also require compensation for the period of

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[2] The full name of the church was First English Evangelical Lutheran Church of Glendale, and the case is more typically known to the bench and bar as the "*First English*" case.

time the regulation denied the owner all use of the land. (*First English, supra,* 482 U.S. at pp. 318, 321.) The court stated, "Here we must assume [on demurrer] that the Los Angeles County ordinance [enacting a moratorium on construction of buildings on the church's property in a flood plain] has denied appellant all use of its property for a considerable period of years, and we hold that invalidation of the ordinance without payment of fair value for the use of the property during this period of time would be a constitutionally insufficient remedy." (*Id.* at p. 322.) "We merely hold that where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." (*Id.* at p. 321.)

The court in *First English* indicated two circumstances in which such a temporary denial of all use of the property would not require compensation: (1) the denial of use was required for public *safety* reasons (482 U.S. at p. 313 [on demurrer the court had no occasion to decide "whether . . . the denial of all use was insulated as a part of the State's authority to enact safety regulations"]),[3] or

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[3] In the present case the denial of a demolition permit based on the SRO ordinance does not involve the "public safety" exception. An example of the public safety exception is found in the *First English* case itself, in the subsequent California proceedings on remand from the United States Supreme Court. There it was eventually determined that the interim moratorium on construction of buildings on the church's property in a flood plain satisfied the exception because it was necessary to preserve human life in light of a

(2) the temporary deprivation was merely a normal delay in the permissible regulation of development. (482 U.S. at p. 321 [not deciding "the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like"].)

In *Landgate, Inc. v. California Coastal Com.* (1998) 17 Cal.4th 1006 (hereafter *Landgate*), the California Supreme Court elaborated upon the second exception, "normal delays" in the "development process." There the County of Los Angeles had approved a lot split involving property in the coastal zone. When the owner sought to build upon one of the newly split parcels, the California Coastal Commission refused to issue a permit for any construction, contending that the prior lot split was not legal. Construction was delayed for two years until the landowner obtained a court judgment that the Coastal Commission had no legal jurisdiction over the lot split. The landowner contended this delay denied it all viable use of the property for two years, which constituted a temporary taking requiring compensation. The California Supreme Court held to the contrary, that "the mistaken assertion of jurisdiction over a development is part of the development approval process, and development delays that result therefrom may be imposed on the developer rather than the general taxpayer without violating the United States Constitution." (*Id.* at pp. 1021, fn. omitted.)

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fatal flood which had occurred there. (*First English Evangelical Lutheran Church v. County of Los Angeles* (1989) 210 Cal.App.3d 1353, 1370.)

"Here, there was a postponement of development pending resolution of a threshold issue of the development approval process – whether the lot was legal – and not a final decision denying development." (*Id.* at pp. 1029-1030.) "[A] judicial determination of the validity of certain *preconditions to development* is a normal part of the development process, and the fact that a developer must resort to such a determination does not constitute a per se temporary taking." (*Id.* at p. 1030, italics in original.)

In the reply briefs submitted after *Landgate* was decided, the City contends *Landgate* controls and compels judgment in favor of the City, whereas Ali distinguishes *Landgate* and contends *First English* controls and compels affirmance of the judgment in favor of Ali. We conclude the facts of the present case are distinguishable from *Landgate*, and the delay between January 1989 and August 1990 in issuing a demolition permit was a temporary regulatory taking, not a normal delay in the development process.

For the purpose of this appeal we treat as an established fact that the denial of the demolition permit deprived Ali of all economically viable use of his land during the period in question. (See *First English, supra,* 482 U.S. at pp. 313, 321 [allegation of complaint assumed to be true on demurrer], and *Lucas v. South Carolina Coastal Council, supra,* 505 U.S. at pp. 1009, 1020 [trial court's factual findings were binding].) Judge Crispo made the following factual findings: "The SRO ordinance prevented the immediate demolition of the Ferraro. This denied Ali the benefits of his contract with Harouni for the sale of the property on which the Ferraro stood. As a result of the November 17, 1988 fire, the property was

damaged beyond feasible repair. Consequently, demolition was the only economically viable option for the Ferraro's owner. Additionally, the City later evicted the few remaining tenants still occupying the hotel, further denying Ali the rents the Ferraro generated." The City does not even acknowledge Judge Crispo's findings and makes no attempt to satisfy its burden as an appellant to demonstrate that there is *no substantial evidence* to support those findings. (*Green v. Green* (1963) 215 Cal.App.2d 31, 35.) The City's sole assertion on this point, that Ali was not denied all economically viable use of his property because "[a]lthough there was a delay in the sale of his property to Harouni, Ali did sell to the original purchaser," is a non sequitur which fails to address the temporary deprivation of all use of the property.

This brings us squarely to the nub of this case: was the erroneous denial of a demolition permit, in violation of the Ellis Act, which temporarily deprived Ali of all economically viable use of the property, merely a "normal delay" in the "development process" as explained in *Landgate*?

In *Landgate*, the landowner obtained from the county a lot split in order to develop undeveloped property which lay in the coastal zone. The Coastal Commission would not approve any construction because, it contended, the lot split was not legal. All development was thereby stymied until, through litigation, the landowner obtained a judgment that the Coastal Commission had no legal authority over the lot split. The landowner later contended this delay was a temporary regulatory taking requiring compensation. The trial court and the Court of Appeal agreed, but the California Supreme Court granted

review and held the delay was a normal delay in the development process.

The Supreme Court explained that, "Part of that regulatory process is the imposition of certain procedural conditions and substantive requirements on development. . . . [A] government agency may deny a development permit when the reasonable conditions imposed on development are not met[,] without that denial constituting a taking. . . . [T]he imposition of a development condition is not a constitutional violation merely because that condition is subsequently shown to have been erroneously imposed. . . . Landgate's development was denied because of the Commission's plausible, though perhaps legally erroneous, position that Landgate or its predecessor failed to comply with one of the conditions of obtaining a coastal development permit by illegally reconfiguring the lot boundaries." (17 Cal.4th at pp. 1027-1028.)

The Court of Appeal had concluded that the Commission's position on the illegality of the lot split furthered no legitimate governmental interest, merely " 'the Commission's ongoing jurisdictional spat with the County of Los Angeles combined with a desire to prevent Landgate from building on its parcel.' " (17 Cal.4th at p. 1016.) The Supreme Court disagreed based on the circumstances of the particular case. It held the Court of Appeal erred in "attempt[ing] to divine, through the statements of the commissioners and Commission staff and through circumstantial evidence, the 'true,' illegitimate, motive for the Commission's decision to deny Landgate's development permit. The proper inquiry is not into the subjective motive of the government agency, but whether there

is, objectively, sufficient connection between the land use regulation in question and a legitimate governmental purpose so that the former may be said to substantially advance the latter." (17 Cal.4th at p. 1022.) The Supreme Court found that the Commission's position on the illegality of the lot split was objectively reasonable. It was not based "on formal, jurisdictional or bureaucratic grounds, but on the view that such [lot-line] adjustment would lead to an intensification of the environmental impacts with which the Commission was concerned." (*Id.* at p. 1023.) Furthermore, the Commission's conclusion concerning its legal authority to deny the lot line adjustment was "following the Attorney General's advice, that [Public Resources Code] section 30106 gave it authority[. Its position was] 'supported by a plausible though [perhaps] erroneous legal argument' and therefore not the basis of a taking." (*Id.* at p. 1025.)

The Supreme Court cautioned, however, "It would be, of course, a different question if, even though the Commission's position on the lot line adjustment substantially advanced a legitimate state interest, that position was so unreasonable from a legal standpoint as to lead to the conclusion that it was taken for no purpose other than to delay the development project before it. Such a delaying tactic would not advance any valid government objective." (*Id.* at p. 1024.) "Of course, as explained in the preceding part of this opinion, a government agency may not evade the takings clause by fabricating a dispute over the legality of a lot, or by otherwise arbitrarily imposing conditions on development in order

to delay or discourage that development. The government agency's assertion of authority, whether or not erroneous, must advance some legitimate government purpose." (*Id.* at p. 1029.) In other words, even if the agency action depriving the owner of all viable use occurs "during" the development process, and ostensibly serves a proper governmental purpose, it is not a "normal" delay in the process if it is so unreasonable from a legal standpoint as to be arbitrary. (*Id.* at pp. 1021, 1022, 1024-1025, 1029, 1030.)

Applying the teachings of *Landgate* to the present case, we conclude the City's attempt to enforce its SRO ordinance in violation of the Ellis Act involves the "different question" suggested by *Landgate*, where the position taken by the City was "so unreasonable from a legal standpoint" as to be arbitrary, not in furtherance of any legitimate governmental objective, and for no other purpose than to delay any development other than for an SRO hotel. Therefore the delay in demolition of the hotel was a temporary regulatory taking requiring compensation.

The City contends that its erroneous enforcement of the SRO ordinance had the legitimate governmental objective of preserving the availability of low income housing. This apparent purpose does not save the City from its temporary taking of Ali's property, because it was arbitrary and unreasonable in light of the Ellis Act. In our prior opinion in this case, we pointed out that Ali's argument was supported by authority already existing when the City in 1989 and 1990 prevented Ali from demolishing his hotel. In *Javidzad v. City of Santa Monica* (1988) 204 Cal.App.3d 524, a local rent control law

required that in order to obtain a permit to demolish controlled rental units a landlord must show that repair is not economically feasible or that redevelopment of the property would include 15 percent low income housing. The appellate court held the Ellis Act preempted the local law and that the owner was entitled to issuance of a demolition permit without having to comply with the local law conditions. (*Id.* at pp. 530-531.) We concluded, "Similarly here, the SRO ordinance prevents a landlord who desires to go out of the SRO hotel business from demolishing the hotel and redeveloping the property, and instead requires the landlord either to repair the hotel and remain in business, rebuild with replacement units, or establish financial hardship. The SRO ordinance suffers from the same defects as the Santa Monica rent control law in *Javidzad*." (*Ali v. City of Los Angeles*, B077712, *supra*, slip opinion at pp. 6-7.)

Therefore, based on the teachings of *Landgate*, the delay in demolition caused by the erroneous enforcement of the SRO ordinance despite the prohibitions of the Ellis Act was not a "normal" delay in the development process. Because the delay temporarily deprived Ali of all use of his property and was not a normal delay in the development process, it was a temporary regulatory taking which required compensation under *First English*. Judge Crispo correctly awarded a judgment in favor of Ali in inverse condemnation.

The City alternatively contends that the temporary delay was Ali's own fault, because Ali allegedly did not timely seek administrative review of the determination that the Ferraro was an SRO hotel. It is the City's position that timely exhaustion of administrative remedies is a

necessary part of the normal development process, citing *Hensler v. City of Glendale* (1994) 8 Cal.4th 1. This argument does not apply to the circumstances of this case. First, it is precluded by the factual findings of the trial court. Both Judge O'Brien and Judge Crispo found factually that *none* of the delay in issuance of the demolition permit is attributable to Ali. As noted ante, the City does not appeal from Judge O'Brien's findings, which were incorporated in the judgment, and the City does not challenge Judge Crispo's factual findings for lack of substantial evidence.

Moreover, administrative review of the determination whether the Ferraro was an SRO hotel is irrelevant. Whether or not the Ferraro was an SRO hotel, Ali was entitled under the Ellis Act to demolish it and go out of the SRO hotel business. We held in the prior appeal that Ali was excused from exhausting administrative remedies, because the issue whether the City's SRO ordinance was invalid in light of the Ellis Act was not an issue for the Building and Safety Department acting administratively. We are not reviewing the classification of the Ferraro as an SRO hotel, but rather the City's legally erroneous invocation of its SRO ordinance against Ali in violation of the Ellis Act. The City may not simply delay development by fabricating an irrelevant dispute about whether the Ferraro was an SRO hotel. (*Landgate, supra*, 17 Cal.4th at p. 1029.)

If the City is arguing that Ali's litigation to determine the illegality of applying the SRO ordinance to him in light of the Ellis Act is part of the "normal delay in the development process" within the meaning of *Landgate*, we reject that contention. In *Landgate*, the Coastal Commission's

position on the illegality of the prior lot split was plausible, supported by written advice of the Attorney General, and furthered legitimate governmental objectives relating to coastal development. Here the inapplicability of the SRO ordinance in light of the Ellis Act was apparent from a 1988 appellate court opinion involving a similar requirement in the Santa Monica rent control ordinance. The City has never disputed the unenforceability of the SRO ordinance in light of the Ellis Act nor claimed a good faith mistake similar to the mistake of the Coastal Commission in *Landgate*. The City's delay of the demolition was so unreasonable from a legal standpoint as to be arbitrary and not in furtherance of any legitimate governmental objective. Therefore the delay incurred by the City's insistence that the SRO classification precluded issuing a demolition permit, including the ensuing litigation, were not simply normal delays in the development process.

DISPOSITION

The judgment is affirmed. Plaintiff Ali's cross-appeal from the judgment is dismissed as moot. Costs on appeal are awarded to plaintiff.

CERTIFIED FOR PUBLICATION

VOGEL (C.S.), P.J.

We concur:

CURRY, J.
DAU, J.*

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* Assigned by the Chairperson of the Judicial Council.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

SYED MOUSSAM ALI, Plaintiff and Petitioner v. CITY OF LOS ANGELES, et al., Plaintiffs and Respondents	CASE NO. BC 008240 (Proposed) **Judgment** [C.R.C. 232.5] (Filed Jun 26, 1997)

The first portion of this trial, a hearing on Petitioner and Plaintiff SAYED MOUSSAM ALI's first cause of action for a Writ of Administrative Mandamus, came on regularly for trial on September 27, 1996, in Department 85 of this Court, the Honorable Robert O'Brien, Judge, presiding. Petitioner/Plaintiff appeared by Counsel Rosario Perry; Respondent/Defendant appeared by Deputy City Attorney Michael L. Klekner.

The record of the administrative proceedings and additional evidence were received and examined by the Court, and the Court heard argument of counsel. The matter was submitted to the Court for decision on September 27, 1996, and the court thereafter granted the Petition and entered a Statement of Decision on October 30, 1996. The Statement of Decision granted the Petition for Writ of Administrative Mandate and awarded Petitioner/Plaintiff the sum of $399,240.56, plus interest at the rate of 7% per year from May 31, 1991 until paid, and his costs.

In a bifurcated trail [sic] on the remaining causes of action, the court first held a trial to determine if a taking had occurred under Plaintiff's Inverse Condemnation cause of action. Phase 1 came on regularly for trial on March 18, 1997, in Department 58 of the above entitled Court, the Honorable Lawrence W. Crispo, Judge, presiding. Petitioner/Plaintiff appeared by attorneys Rosario Perry and Marie E. Berglund; Respondent/Defendant CITY OF LOS ANGELES appeared by Deputy City Attorney Michael L. Klekner.

The matter was heard by the Court, which duly considered the testimony and evidence submitted by the parties and the argument of counsel. The matter was submitted for decision on March 27, 1997, and the Court issued its Statement of Decision on Phase I on April 9, 1997 in which the Court ruled *in favor* Plaintiff/Petitioner on his *sixth cause of action for* Inverse Condemnation [], that the City had engaged in both a physical taking and a regulatory taking of Petitioner/Plaintiff's property.

Phase 2 of the trial came on regularly for trial on April 14, 1997, in Department 58 of the above entitled Court, the Honorable Lawrence W. Crispo, Judge, presiding. Petitioner/Plaintiff appeared by attorneys Rosario Perry and Marie E. Berglund; Respondent/Defendant CITY OF LOS ANGELES appeared by Deputy City Attorney Michael L. Klekner.

Plaintiff/Petitioner and the City both having waived their right to a trial by jury, Phase 2 was also heard by the Court, which duly considered the testimony an evidence submitted by the parties and the argument of counsel. The matter was submitted for decision on April 15, 1997,

and the Court issued its Statement of Decision on Phase 2 on May 1, 1997.

In its Statement of Decision for Phase 2, the Court awarded damages to Petitioner/Plaintiff on the Sixth Cause of Action *for inverse condemnation,*[] in the total amount of $1,199,237.00; and ruled for Respondent/Defendant on Petitioner/Plaintiff's Second Cause of Action, for Civil Rights violation []. *Judgment on the Second Cause of Action was for Respondent/Defendant.*

THEREFOR IT IS HEREBY ORDERED AND ADJUDGED THAT:

1. A peremptory writ of mandamus pursuant to Code of Civil Procedure section 1094.5 shall issue from the Court commanding Respondent/Defendant City of Los Angeles to rescind the assessments for security services against Petitioner/Plaintiff Ali and to pay to Petitioner/Plaintiff Ali the sum of $399,240.56, plus interest at the rate of 7% per year from May 31, 1991 to date of payment, which interest amounts to the additional sum of $167,680 to date, for a total award of $566,920, and to take any further action specially enjoined on it by law; but nothing in this judgment or in the writ shall limit or control in any way the discretion legally vested in Respondent/Defendant.

IT IS FURTHER ORDERED AND AJUDGED THAT:

2. Judgment shall be entered on the Sixth Cause for Inverse Condemnation in favor of Petitioner/Plaintiff, Syed Mouzzam Ali, and against Respondent/Defendant, City Of Los Angeles, in the sum of $1,199,237.00, which sum includes all interest due thereon to date;

3. Judgment shall be entered on the Second Cause of Action for Civil Rights violation in favor of Respondent/Defendant City of Los Angeles, and against Petitioner/Plaintiff, Syed Mouzzam Ali;

4. Petitioner/Plaintiff Syed Mouzzam Ali to recover costs from Respondent/Defendant City of Los Angeles, in the sum of $___.

5. Plaintiff/Petitioner Syed Mouzzam Ali to recover reasonable attorney's fees from Respondent/Defendant City of Los Angeles, in the sum of $___.

6. This court will retain jurisdiction over this matter for the purpose of determining the amount of costs and attorney's fees to be awarded

DATED: JUN 26 1997

/s/ LAWRENCE W. CRISPO
LAWRENCE W. CRISPO,
Judge of the Superior Court

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1333 Ocean Avenue
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Attorney for Petitioner/
Plaintiff SYED MOUZZAM ALI

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES**

SYED MOUSSAM ALI, Plaintiff and Petitioner v. CITY OF LOS ANGELES, et al., Plaintiffs and Respondents	**CASE NO. BC 008240** **NOTICE OF ENTRY OF JUDGMENT** (Filed Jul 03, 1997)

TO RESPONDENT/DEFENDANT CITY OF LOS ANGELES AND TO THE LOS ANGELES CITY ATTORNEY'S OFFICE, ITS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on June 26, 1997, the Honorable Lawrence W. Crispo entered the Judgment in the above-entitled matter. A copy of said judgment executed by the Honorable Lawrence W. Crispo it attached hereto.

Dated: JUNE 30, 1997

/s/ Rosario Perry
ROSARIO PERRY,
Attorney for Petitioner and
Plaintiff Syed Mouzzam Ali

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

DATE: 05/01/97

HONORABLE LAWRENCE W. CRISPO JUDGE

HONORABLE
22. A. SALDANA, CSL JUDGE PRO TEM
Deputy Sheriff

DEPT. 58

C. MASON DEPUTY CLERK
S. SOLOMON, ASST. CLK
NONE ELECTRONIC RECORDING MONITOR
NONE Reporter

3:00 pm BC008240

SYED MOUZZAM ALI
VS.
CITY OF LOS ANGELES

170.6 JUDGE DIANE WAYNE

Plaintiff

Counsel

NO APPEARANCES

Defendant

Counsel

NATURE OF PROCEEDINGS:

RULING ON SUBMITTED MATTER

The Court having taken the matter under submission, issues its ruling in accordance with the attached STATEMENT OF DECISION, attached hereto, consisting of four (4) pages and incorporated herein.

A true copy of this minute order and attachments are mailed to counsel by U.S. Mail, first class, addressed as follows:

ROSARIO PERRY
1333 Ocean Avenue
Santa Monica, CA 90401

MICHAEL KLEKNER
1700 City Hall East
200 N. Main Street
Los Angeles, CA 90012

STATEMENT OF DECISION

This is a bifurcated trial where, in phase two, the court rules on two issues:

(1) Whether the City of Los Angeles violated Mr. Ali's due process rights.

(2) What damages will be awarded in phases one and two.

The court, having considered all the evidence, now rules as follows:

PHASE 2:

DUE PROCESS VIOLATIONS: FOR THE DEFENDANT

Procedural Due Process

The two principal mechanisms for protection of procedural due process are notice and opportunity to be heard. Mr. Ali contends that he was given neither. The state must afford " . . . a full judicial mechanism with which to challenge the administrative decision to deny an application for a permit." Midnight Sessions v. City of

Philadelphia (3rd Cir. 1991) 945 F.2d 667. Ali was provided a copy of the city's motion of August 8, 1989 prior to the City Council hearing. His financial advisor, Mr. Hilton, was aware of the motion and Mr. Ali had actual notice of the motion.

Mr. Ali was also given an opportunity to be heard. Mr. Tharpe gave Mr. Cacciopo, Ali's former attorney, the requisite papers for challenging the City's actions. Ali refused to avail himself of this remedy and chose to litigate instead. His lawsuit was eventually dismissed for failure to exhaust his administrative remedies.

Mr. Ali was therefore given both notice and opportunity to be heard with respect to the City's action and his procedural due process rights were not violated.

Substantive Due Process

Mr. Ali contends that the City's denial of the demolition permit gives him a substantive due process claim under 42 U.S.C. 1983. The test for establishing such a claim is to (1) show a "valid property interest within the meaning of the Constitution" *and* (2) show that the government's denial of the application was (i) oppression or (ii) abuse of government power that shocks the conscience or (iii) action that is legally irrational because not sufficiently related to any legitimate state interests. *Clark v. City of Hermosa Beach* (1996) 48 C.A.4th 1152.

Mr. Ali did have a valid property interest in the Ferraro hotel. However, the City's actions were not oppressive nor do they shock the conscience. While the

actions of the City's employees were negligently performed, there is no credible evidence that they deliberately sought to deprive Mr. Ali of his due process rights. On the contrary, the court finds that they acted in good faith. Finally, the City's action, though misguided, was an attempt to further legitimate interests in protecting both its zoning integrity and the public. Consequently, there was no violation of Mr. Ali's substantive due process rights.

DAMAGES: FOR THE PLAINTIFF

Phase 1:

The parties have stipulated as to damages on the inverse condemnation cause of action. The court, having found both regulatory and physical takings, awards plaintiff undisputed damages as stated in items 1 through 5 in the stipulation filed on April 15, 1997. The total of these items is $1,179,821. The court also awards the disputed damages contained in items 6 and 7 of the stipulation on damages. But for the City's action, Mr. Ali would have sold the Ferraro to Mr. Harouni and would not have incurred the property taxes he ultimately paid. The total of these items is in the agreed upon amount of $19,416. The total award is **$1,199,237.**

Phase 2:

The court finds no due process violations. Therefore, no damages are awarded on this cause of action.

WRIT OF MANDATE

Pursuant to Judge O'Brien's order of October 1, 1996, this court orders that Judge O'Brien's statement of decision and the judgment to be entered thereon shall be

incorporated into the final judgment. Said monetary orders are in addition to the court's decision of this date.

Plaintiff is ordered to prepare a judgment and submit it to defendant within 15 days for approval as to form and content.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

DATE: 04/09/97

HONORABLE LAWRENCE W. CRISPO JUDGE

HONORABLE JUDGE PRO TEM
10.

S. RAMEY, CSL Deputy Sheriff
DEPT. 58

C. MASON DEPUTY CLERK
S. SOLOMON, ASST. CLK
NONE ELECTRONIC RECORDING MONITOR

C. OLESON, CSR #3025 Reporter

2:00 pm BC008240

SYED MOUZZAM ALI
VS.
CITY OF LOS ANGELES

170.6 JUDGE DIANE WAYNE

Plaintiff Counsel ROSARIO PERRY [X]

Defendant Counsel MICHAEL KLEKNER [X]

NATURE OF PROCEEDINGS:

COURT TRIAL IN PROGRESS
Court Trial resumes from March 27, 1997.

The Court finds for the Plaintiff as to Phase I of this matter.

The Court issues it's [sic] Statement of Decision, attached hereto, consisting of 5 pages and incorporated herein.

As previously stipulated, all exhibits and testimony accepted in Phase I are also accepted in Phase II.

All parties are excused and ordered to return at 10:30 am on April 14, 1997 in this department.

Notice waived.

NATURE OF PROCEEDINGS: STATEMENT OF DECISION

This is a bifurcated trial where, in phase one, the court rules on the issue of taking. The Court heard evidence as to whether there was a taking of property. Evidence was presented by declaration, deposition, documentary evidence and oral testimony submitted by both parties. The court having read and considered such evidence, now finds as follows:

PHASE 1: FOR THE PLAINTIFF.

The Court's Factual Findings

In 1982, Plaintiff Syed Mouzzam Ali ("Ali") purchased the Ferraro Hotel ("Ferraro"), which was located at 2065 West 6th Street in Los Angeles. Ali improved the building and housed prison parolees there until a fire damaged the Ferraro on November 17, 1988. The day of the fire, an inspector for the City of Los Angeles ("the City") determined that the property was 35% destroyed. Based upon other credible evidence, the Court finds that the Ferraro sustained over 50% damage and was not economically feasible to repair. The demolition permit

(discussed below) should have been granted by the City when first requested by Ali.

On December 16, 1988, Ali contracted with Fred Harouni ("Harouni") to sell the property on which the Ferraro was located for $2,700,000. Pursuant to their agreement, Ali and his close financial advisor [sic], Alan Hilton ("Hilton"), applied for a demolition permit from the City on January 19, 1989. Building and Safety Department ("BSD") Inspector Clarence Crisp inspected the property on February 2, 1989 and issued an order for the demolition of the Ferraro, effective February 13, 1989. The City issued an abate order to demolish the Ferraro on February 13, 1989. On March 17, 1989, Inspector Crisp rescinded his February 13 abate order to demolish the hotel. He also demanded that the Ferraro be repaired.

Ali, Hilton and Harouni made repeated inquiries regarding their application for a demolition permit from the City. They made multiple contacts with BSD and Councilwoman Gloria Molina's ("Molina") office. On June 14, 1989, Ali received a letter from Molina's office indicating that the Ferraro was designated a Single Residence Occupancy ("SRO"). Under City regulations, an SRO building could not be demolished unless the City grants a hardship exemption. Molina subsequently offered to present a resolution to the City for a hardship petition should provisions for low income housing be included in the proposed development on that site.

On July 4 and July 13, 1989, the Ferraro sustained further damage by fire. On August 10, 1989, the City ordered Ali to secure the Ferraro and post twenty-four hour guards on the property. The City subsequently

found that Ali had failed to comply with this order. Councilwoman Molina then presented a resolution which the City Council passed, allowing the City to post guards on the property and the Department of Public Works to board up the Ferraro.

The City ultimately determined that the Ferraro was not an SRO and granted Ali's request for a demolition permit in August 1990. Demolition of the Ferraro began on August 17, 1990. The property was finally sold to Harouni for $2,350,000, which was $350,000 less than the previously agreed-upon contract price.

The Court independently finds, as was found by the Court of Appeal, that the delay in the issuance of the demolition permit was not caused by Ali's conduct and that the City was responsible for all of the delay. The court also finds that Ali acted properly in his attempts to obtain the demolition permit.

Basis of Decision

A taking of property occurs when a government regulation eliminates the economic viability of property to its owner. *Lucas v. South Carolina Coastal Council* (1992), 505 U.S. 1003. A taking also occurs if the government physically occupies the property. *Loretto v. Teleprompter Manhattan CATV* (1982) 458 U.S. 419. When a taking occurs, the government must pay just compensation to the property owner. U.S. CONST., AMEND V. Just compensation is required even if the taking is a temporary one. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles* (1987) 482 U.S. 304.

The court finds that the City effected both regulatory and physical takings.

Regulatory taking: The denial of Ali's application for a demolition permit pursuant to the City's Rent Stabilization Ordinance ("RSO") constituted a regulatory taking. A regulatory taking occurs when an ordinance "does not substantially advance legitimate state interests or denies an owner economically viable use of his land." *Agins v. City of Tiburon* (1980) 447 U.S. 255, 260.

The City's initial designation of the Ferraro as an SRO was erroneous. The SRO ordinance prevented the immediate demolition of the Ferraro. This denied Ali the benefits of his contract with Harouni for the sale of the property on which the Ferraro stood. As a result of the November 17, 1988 fire, the property was damaged beyond feasible repair. Consequently, demolition was the only economically viable option for the Ferraro's owner. Additionally, the City later evicted the few remaining tenants still occupying the hotel, further denying Ali the rents the Ferraro generated.

Physical Taking: The City's posting of guards on the property constituted a physical taking of the Ferraro. "A public entity . . . 'takes' . . . private property when it physically invades that property in any tangible manner." *San Diego Gas & Electric Co v. Superior Court* (1996) 13 Cal. 4th 893, 940.

The City claims that posting guards on the Ferraro promoted public health and safety. Health and safety issues traditionally fall within the City's police powers. However, because the City itself was responsible for the erroneous designation of the Ferraro as an SRO, police

powers may not be used to justify its actions. The need to exercise the City's police powers to eradicate the health and safety problems posed by the Ferraro would not have arisen had the City not denied Ali's demolition permit. The health and safety concerns which arose after the denial of the demolition permit stem directly from the City's failure to allow the demolition of the Ferraro. The City itself created the health and safety concerns which it subsequently attempted to address.

IN THE COURT OF APPEAL OF THE STATE
OF CALIFORNIA SECOND APPELLATE DISTRICT
DIVISION: 4

DATE: January 25, 2000

Office Of The City Attorney
Michael L. Klekner
1700 City Hall East
200 North Main Street
Los Angeles, CA 90012-4130

ALI, SYED MOUZZAM

Plaintiff-Respondent

v.

LOS ANGELES, CITY OF

Defendant-Appellant

B114226
Los Angeles County No. BC008240

THE COURT:

Petition for Rehearing is denied.

Second Appellate District, Division Four, No. B114226
S085680

IN THE SUPREME COURT OF CALIFORNIA
EN BANC

SYED MOUZZAM ALI, Respondent

v.

CITY OF LOS ANGELES, Appellant

Appellant's petition for review DENIED.

The request for an order directing depublication of the opinion is denied.

/s/ GEORGE
Chief Justice

NOT FOR PUBLICATION

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

SYED MOUZZAM ALI, Plaintiff and Appellant, v. CITY OF LOS ANGELES, Defendant and Respondent	B077712 (Super. Ct. No. BC008240) (Filed May 9, 1995)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert H. O'Brien, Judge. Reversed.

Rosario Perry and Marie E. Berglund for Plaintiff and Appellant.

James K. Hahn, City Attorney, Claudia McGee Henry, Senior Assistant City Attorney, L. Wayne Mooney and Gloria Dabbs Mann, Deputy City Attorneys, for Defendant and Respondent.

INTRODUCTION

Plaintiff and appellant Syed Mouzzam Ali owned a hotel, known as the Ferraro, at 2065 West 6th Street in Los Angeles. In November 1988, a fire gutted the hotel. Appellant desired to demolish the building and sell the land. In January 1989 he applied to defendant and respondent City of Los Angeles for a demolition permit. The City withhold the permit, based on information that the Ferraro was a single room occupancy (SRO) hotel, a

type of residential hotel defined by City ordinance according to the limited percentage of individual units having private bath and toilet facilities. In order to preserve the supply of such low income housing, the City ordinance prohibited for 180 days (periodically renewed) the issuance of a demolition permit for SRO hotels, except by order of the Building and Safety Department upon a determination the building was infeasible to repair, or upon agreement of the owner to replace with similar housing, or upon a showing of extreme hardship.

Eventually, but not until August 1990, the City determined the Ferraro was not an SRO hotel and permitted its demolition. In the meantime, however, commencing July 1989, a series of arson fires occurred in the building, the City determined appellant was not providing adequate security, and the City contracted for 24-hour security, with the cost to be assessed against the property, pursuant to section 91.8906 of the Los Angeles Municipal Code (L.A.M.C.). In March 1990, August 1990, and January 1991, the City Council approved three assessments, totaling about $375,000, for the cost of this security protection.

In the present action appellant sought a writ of administrative mandate (Code Civ. Proc., § 1094.5) to set aside the assessments against the property, and other relief. Appellant argued that the assessments were improper because the delay in issuing the demolition permit was unlawful, and if the City had timely issued the demolition permit, the need for security protection would not have arisen. Appellant contended that the City's initial determinations that the Ferraro was an SRO hotel and that is was feasible to repair were subsequently

conceded to be wrong. Appellant further contended that even if the City had been correct that the Ferraro was an SRO hotel, the City wrongfully delayed the permit by suggesting the SRO ordinance required appellant to agree to replace the building with similar housing. Appellant, who desired to get out of the residential hotel business and sell the land to a developer, contended the City's condition violated the Ellis Act, Government Code section 7060, subdivision (a), which provides in pertinent part, "No public entity . . . shall, by statute, ordinance, or regulation, or by administrative action implementing any statute, ordinance or regulation, compel the owner of any residential real property to offer, or to continue to offer, accommodations in the property for rent or lease."

The trial court denied the writ of administrative mandate. The court concluded that despite the City's August 1990 concession that the Ferraro was not an SRO hotel, substantial evidence supported the earlier contrary determination, therefore the City did not abuse its discretion. The trial court made no finding as to the Ellis Act, despite appellant's objection that the statement of decision failed to address it.

CONTENTIONS

Appellant raises a variety of contentions, among them that the delay in issuing the demolition permit violated the Ellis Act. Substantially agreeing with the latter contention, we conclude the trial court committed reversible error in failing to address the Ellis Act issues. We reverse for further proceedings.

ELLIS ACT
Background

The City's SRO ordinance was enacted to prevent the potentially irreversible loss of a type of housing deemed essential to the low income housing market, SRO hotels. The ordinance defines an SRO hotel to be an apartment building, hotel, or other structure containing six or more guestrooms in which 30 percent or more of the units do not contain a private bath and toilet facility within the unit. The ordinance prohibits for 180 days the issuance of a demolition permit for SRO hotels unless the Building and Safety Department orders demolition upon a determination the building is infeasible to repair. Absent such an order from the Department, the ordinance provides, "No building permit shall be issued for any new construction on a lot where a Single Room Occupancy Hotel was demolished . . . unless the applicant agrees to replace on such lot all of the single room occupancy units that were on the lot prior to the demolition."

The Department had information that, prior to its being gutted by fire, the Ferraro had a configuration of rooms and bath and toilet facilities that made it an SRO. The Department also determined that the damaged structure was feasible to repair. Appellant learned by a June 14, 1989 letter from Councilwoman Molina, in whose district the hotel was located, that a demolition permit could be obtained by City Council resolution if appellant agreed to provide replacement low income housing as part of the proposed new mixed use project for the lot. In other words, the City's delay of appellant's demolition permit was based on the assumptions that the Ferraro

was subject to the SRO ordinance and that the SRO ordinance validly required replacement low income housing.

In a superior court complaint filed September 5, 1989, by appellant's prior counsel, appellant contended (1) the Ferraro was not an SRO hotel, because prior to its substantial destruction by fire more than 30 percent of its rooms had private bath and toilet, (2) the building was not feasible to repair, and (3) because appellant did not wish to remain in the residential rental business but to sell the lot without a building upon it, application of the SRO ordinance violated the Ellis Act. That complaint was dismissed in March 1990 for failure to exhaust administrative remedies.

In the subsequent administrative hearings conducted by the Building and Safety Department in May and June of 1990 on appellant's appeal from denial of the demolition permit, the main issues were the feasibility of repair and the number and configurations of bathroom facilities. Those appeals were resolved against appellant upon substantial conflicting evidence. Nevertheless, on August 1, 1990, the director of the Rent Stabilization Division informed appellant that as a result of substantial questions raised in the administrative hearings and additional investigation and evaluation based on new evidence, she concluded the Ferraro was not an SRO hotel; the City's objections to the demolition permit were dropped. The permit issued, and the building was demolished August 15, 1990.

In January 1991, the third of the three assessments for security protection came before the City Council for confirmation. Appellant argued it was unfair to assess these

security costs in light of the revelation that the Ferraro was not an SRO hotel; he argued the delay of the demolition was based on a mistake, and that a timely demolition would have prevented the need for expensive security. On behalf of appellant's wife who had an interest in the property, another attorney argued the City should admit its mistakes and withdraw the assessments. In his written statement he urged that the earlier condition imposed by the City that appellant replace low income housing on the property violated the Ellis Act.

Analysis

The City Contends the Ellis Act is moot because the City eventually decided the Ferraro was not an SRO hotel and permitted its demolition. Similarly, the trial court may have thought the Ellis Act issue was mooted by the court's finding that, at the time of the administrative hearings, there was substantial evidence to support a finding the Ferraro was an SRO hotel, even though the City subsequently reversed its position.

We disagree. The City's mootness argument is based on an illogical conclusion that is the City eventually decided the Ferraro was not an SRO hotel, then the City never applied the SRO ordinance to the Ferraro. On the contrary, if appellant is correct that application of the SRO ordinance violates the Ellis Act, the *delay* of the demolition permit based on the SRO ordinance was improper, just as denial would have been improper if the Ferarro was an SRO hotel. If appellant can prove that he could and would have promptly demolished the building if he had been promptly granted a permit, and therefore

the unusual security protection measures would never had been necessary, at least a portion of the assessments against the property should be set aside. Appellant should not have to bear the cost of security protection which could have been avoided. The assessment procedure in L.A.M.C. section 91.8906 if for defraying the cost of "necessary" securing of property.

Javidzad v. City of Santa Monica (1988) 204 Cal.App.3d 524, strongly supports appellant's Ellis Act argument. There, a local rent control law required that in order to obtain a permit to demolish controlled rental units a landlord must show that repair is not economically feasible or that redevelopment of the property would include 15 percent low income housing. The court held the Ellis Act preempted the local law and that the owner was entitled to issuance of a demolition permit without having to comply with the local law conditions. The court rejected the city's contention that the condition merely regulated the future use of the property and was therefore consistent with Government Code section 7060.7, subdivision (1). The court held the local law infringed on the landlord's right to go out of the residential rental business which is protected by the Ellis Act. (*Javidzad v. City of Santa Monica, supra,* 204 Cal.App.3d at pp. 530-531.) The court held that to deny a demolition permit, thereby disallowing redevelopment of the property otherwise allowed by local zoning and planning rules, would violate the Ellis Act. (*Id.* at p. 531.; see also *City of Santa Monica v. Yarmark* (1988) 203 Cal.App.3d 153; *Bullock v. City and County of San Francisco* (1990) 221 Cal.App.3d 1072.)

Similarly here, the SRO ordinance prevents a landlord who desires to go out of the SRO hotel business from demolishing the hotel and redeveloping the property, and instead requires the landlord either to repair the hotel and remain in business, rebuild with replacement units, or establish financial hardship. The SRO ordinance suffers from the same defects as the Santa Monica rent control law in *Javidzad*.

The City contends that appellant did not exhaust administrative remedies or timely raise the Ellis Act. We disagree. Appellant raised the Ellis Act in the superior court in his first amended complaint and in one of his trial briefs. Appellant was excused from raising the Ellis Act in the administrative hearings before the Building and Safety Department, because it is doubtful the legislatively-enacted SRO ordinance could have been declared invalid by the Building and Safety Department acting administratively. (See *Anton v. San Antonio Community Hosp.* (1977) 19 Cal.3d 802, 828-829; *Hand v. Board of Examiners* (1977) 66 Cal.App.3d 605, 619.) Even assuming that the City Council should be given an opportunity to decide in the first instance whether its own ordinance is unenforceable (see *Mountain View Chamber of Commerce v. City of Mountain View* (1978) 77 Cal.App.3d 82, 91-96), that was done in this case through the argument of appellant's co-owner. Because the same parcel of property was involved, and the City Council was put on notice of the Ellis Act problem at the third assessment hearing, appellant is not precluded from raising the Ellis Act issue in the trial court and on appeal.

The theory of appellant's case is that is the demolition permit had not been delayed because of the SRO

ordinance, appellant would have promptly demolished the building, and the problems of the arson fires in the structure and need for 24-hour security guards would not have arisen. Appellant will have the burden to prove that had the City not imposed the condition that appellant replace the building with low income housing, appellant could and would have complied with all other legitimate conditions of a demolition permit and could and would have demolished the building before the need for City-imposed security measures arose. The trial court may determine, taking into account delays attributable to appellant and delays attributable to violation of the Ellis Act, what portion of the assessments for security protection should be set aside by writ of mandate.

OTHER ISSUES

In addition to his Ellis Act argument, appellant raises several procedural arguments against the City Council's approval of the assessments and the trial court's denial of the writ of administrative mandate. We find appellant's procedural arguments without merit. We discuss them only briefly.

Administrative Record

Appellant contends that the administrative record lodged with the trial court in two parts was incomplete and not properly authenticated. A legal secretary in the City Attorney's Office certified that the first part consisted of the Building and Safety Department's file No. 900823, City Council file No. 89-1746, and transcripts of hearings of the Building and Safety Commissioners held

June 12, 1990, and of the City Council held January 8, 1991. A deputy city attorney certified that the second part contained public records of the Building and Safety Department concerning the subject property; the delay in producing the second part was explained by the December 14, 1992, declaration of a senior investigator for the Building and Safety Department concerning the difficulty of locating the microfiched file in a large warehouse.

Appellant did not formally object in the trial court that the administrative record was hearsay or unauthenticated an so has waived this issue on appeal. (*Hand v. Board of Examiners, supra,* 66 Cal.App.3d 605, 613; *Hawthorne Savings & Loan Assn. v. City of Signal Hill* (1993) 19 Cal.App.4th 148, 155, fn.1.)

There is no merit to appellant's suggestion the administrative record was incomplete. The fact that appellant belatedly sought to introduce other evidence, regarding weed abatement, from the Department of Public Works does not show the record of the Building and Safety Department proceedings was incomplete. (Code Civ. Proc., § 1094.6, subd. (c).)

The trial court was within its discretion in denying appellant's motion to augment the administrative record with post-administrative-hearing deposition testimony of employees Crisp and Wong. The court found appellant could with reasonable diligence have produced such evidence at the administrative hearing. (Code Civ. Proc., § 1094.5, subd. (e); *Cooper v. Kizer* (1991) 230 Cal.App.3d 1291, 1300.) As to Rent Stabilization Division Director Zeidman's post-administrative-hearing letter reversing the City's position on whether the Ferraro was an SRO

hotel, both parties rely on it without objection and we have taken it into consideration in this opinion.

Notice of SRO Status

Appellant contends he was denied constitutional due process notice because the City or the SRO ordinance itself did not provide for appellant to be given notice and an opportunity for a hearing *before* "classifying" the Ferraro as an SRO hotel. There is no merit to this contention, because the SRO ordinance was of general application and contained a clear objective standard defining an SRO hotel: "An apartment building, hotel, or other structure containing six or more guest rooms in which thirty percent (30%) or more of the units do not contain a private bath and toilet facility within the unit." As aptly stated by one of the panelists at appellant's May 31, 1990, administrative hearing, the owner of a hotel can be expected to know whether its own hotel contains such a combination of rooms, baths, and toilets. It was not up to the City to provide advance notice and hearing to the owner. (See *Horn v. County of Ventura* (1979) 24 Cal.3d 605, 613.) Once appellant learned that the City considered the Ferraro an SRO hotel, appellant had the opportunity for administrative hearings to contest that classification, and he exercised that opportunity between March and June of 1990.

Notice of Assessment Hearings

Appellant's brief summarily asserts that the City failed to prove appellant was given notice of the three City Council hearings to confirm the three assessments against the property. On the contrary, the administrative

record (which we held *ante* was properly received by the trial court) contains substantial evidence that appellant was sent notices of the hearings by certified mail at his home address which he had given the tax assessor for notice purposes. This satisfied due process notice requirements. (See *Hankla v. Governing Bd.* (1975) 46 Cal.App.3d 644, 654-655.)

In his reply brief appellant contends the City's own proof showed the notice of the March 1990 assessment hearing was mailed less than 10 days before the date set for hearing, contrary to the requirement of L.A.M.C. § 91.8906(c)(2). This assessment was recorded on April 30, 1990. Appellant failed to show he challenged it within 90 days of its recording, as required by L.A.M.C. § 91.8906(c)(5).

Amendment of Complaint

Appellant's first amended complaint contained causes of action against the City for writ of mandate, deprivation of civil rights, and interference with contract. On the eve of trial, appellant sought leave to amend to add two causes of action for negligence and inverse condemnation, which the trial court denied. Only the cause of action for writ of mandate went to trial.

We need not decide appellant's contention that the trial court abused its discretion in denying leave to amend to add the new causes of action. After the trial court denied the writ of mandate, the parties entered a stipulation for summary judgment on all of appellant's causes of action, so that this matter could be immediately appealed. They stipulated that the issues regarding the

writ of mandate were dispositive, and that if the judgment as to the writ of mandate were reversed on appeal, the City would not object to setting aside the judgment as to the remaining causes of action. We leave to the trial court to reconsider these issues in its discretion in light of the new circumstance of this reversal.

DISPOSITION

The judgment is reversed and the cause remanded for further proceedings consistent with the views expressed in this opinion. Costs on appeal are awarded to appellant.

NOT FOR PUBLICATION

VOGEL (C.S.),J.

We concur:

WOODS (Arleigh), P.J. EPSTEIN, J.

JAMES K. HAHN, City Attorney
CLAUDIA McGEE HENRY,
Senior Assistant City Attorney
SHARON SIEDORF CARDENAS,
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Attorneys for Defendants/Respondents
CITY OF LOS ANGELES

SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES

SYED MOUZZAM ALI, Plaintiff/Petitioner, vs. CITY OF LOS ANGELES, a municipal corporation, LOS ANGELES CITY DEPARTMENT OF BUILDING AND SAFETY, Does 1 through 100, Inclusive, Defendants/ Respondents.	CASE NO. C 736 585 ORDER OF DISMISSAL

IT HAVING BEEN SHOWN that plaintiff/petitioner SYED MOUZZAM ALI ("Ali") failed to exhaust their

administrative remedies prior to filing the First Amended Complaint, therefore, upon motion of defendants/ respondents City of Los Angeles ("City") and good cause appearing:

ORDER

IT IS HEREBY ORDERED that the First Amended Complaint by Ali is dismissed, pursuant to the provisions of Code of civil Procedure Section 581(f)(1). This Order is not intended to preclude Ali from filing a complaint in a subsequent lawsuit. City shall have and recover costs against plaintiff in the sum of $_____.

Dated: MAR 20 1990

/s/ JOHN ZEBROWSKI
JUDGE JOHN ZEBROWSKI

ORDINANCE NO. 164175

An Ordinance temporarily prohibiting the issuance of demolition permits for Single Room Occupancy Hotels in the City of Los Angeles.

WHEREAS, in recent years there has been an increasing concern on the part of public officials and residents of the City of Los Angeles regarding the shortage of affordable housing; and

WHEREAS, Single Room Occupancy Hotels are a unique form of housing which exist throughout the City of Los Angeles and primarily serve residents at the lowest economic scale, including those residents on fixed income; and

WHEREAS, the City Council has determined that Single Room Occupancy Hotel housing stock is an essential component of the low-income housing market in Los Angeles; and

WHEREAS, at the present time there exists a shortage in the number of rooms available in Single Room Occupancy Hotels which has resulted in a low vacancy rate in such Hotels. In addition, there are few alternative sources of decent, safe, and sanitary housing for the residents of such Hotels; and

WHEREAS, over 90% of Single Room Occupancy Hotels are constructed of unreinforce masonry and must be upgraded to meet the city's seismic safety standards and Dorothy Mae fire code standards, and therefore such structures are increasingly slated for demolition because of the combined effect of the anticipated costs for such rehabilitation and of the increasing attractiveness of the

land upon which these structures are located for conversion to other uses; and

WHEREAS, the permanent loss of the residential units in Single Room Occupancy Hotels will greatly exacerbate the problems confronting the City with respect to the homeless; and

WHEREAS, the City Council has directed the Community Development Department to examine the problem of the threatened loss of irreplaceable housing stock with respect to Single Room Occupancy Hotels, to collect pertinent data, and to present to the Council long range alternatives to the demolition of Single Room Occupancy Hotels which balance the interests of owners and tenants; and

WHEREAS, on July 29, 1987, the City Council passed Ordinance No. 162,663, which became effective on August 4, 1987. Ordinance No. 162,663, prohibited the issuance of demolition permits for Single Room Occupancy Hotels in the City of Los Angeles for 180 days after August 4, 1987. Ordinance No. 163,182 extended the provisions of Ordinance No. 162,663 through April 29, 1988. Ordinance No. 163,622 extended the provisions of Ordinance No. 163,182 through June 30, 1988; and

WHEREAS, Ordinance No. 163,622 expired on June 30, 1988 prior to the development of long term alternatives to the demolition of Single Room Occupancy Hotels; and

WHEREAS, the City requires further time to complete its study and to develop appropriate long range alternative systems; and

WHEREAS, On October 31, 1988, the Governmental Operations Committee of the City Council directed the preparation of an ordinance to reinstate the imposition of interim controls on demolitions of Single Room Occupancy Hotels pending the development of a long-term solution;

NOW THEREFORE,

THE PEOPLE OF THE CITY OF LOS ANGELES

DO ORDAIN AS FOLLOWS:

Section 1. DEFINITIONS.

Te following phrase, whenever used in this Ordinance, shall be construed as defined in this Section. Words and phrases not defined herein shall be construed as defined in Section 12.03 or Section 151.02 of the Los Angeles Municipal Code, if defined therein.

Single Room Occupancy Hotel. As apartment building, hotel, or other structure containing six or more guest rooms in which thirty percent (30%) or more of the units do not contain a private bath and toilet facility within the unit.

Sec. 2. PROHIBITION.

Notwithstanding any provision of the Los Angeles Municipal Code to the contrary, for a period of one hundred-eighty (180) days from the effective date of this Ordinance:

A. No demolition permit shall issue for a building which is a Single Room Occupancy Hotel, except to comply with an order issued by

the Department of Building and Safety pursuant to Sections 91.8903 or 91.8905 of the Los Angeles Municipal Code, which the Department of Building and Safety has determined that such building is infeasible to repair.

B. No building permit shall be issued for any new construction on a lot where a Single Room Occupancy Hotel was demolished after the effective date of this ordinance without first obtaining a demolition permit from the Department of Building and Safety, unless the applicant agrees to replace on such lot all of the single room occupancy units that were on the lot prior to the demolition.

Sec. 3. HARDSHIP EXEMPTION.

A. The City Council, acting in its legislative capacity, may, by resolution, grant an exemption from the provisions of this Ordinance in cases of extreme hardship duly established to the satisfaction of the City Council.

B. Exemption Procedures. An application for a hardship exemption shall be filed with the Rent Stabilization Division of the Community Development Department on forms provided by the Department.

Sec. 4. URGENCY CLAUSE.

The City Council finds and declare that this Ordinance is required for the immediate protection of the public peace, health and safety. This Ordinance will prevent potentially irreversible loss of housing stock essential for the housing of a segment of the population of the City of Los Angeles. It will also preserve the public peace and health by discouraging the displacement of community residents, which overtaxes the City's ability of [sic]

provide adequate police and sanitation services to the detriment of the health and safety of City residents. Therefore, this Ordinance shall become effective upon publication pursuant to Section 281 of the Los Angeles City Charter.

Sec. 5 The City Clerk shall certify to the passage of this ordinance and cause the same to be published in some daily newspaper printed and published in the City of Los Angeles.

I hereby certify that the foregoing ordinance was passed by the Council of the City of Los Angeles, as at the meeting of NOV 08 1988.

ELIAS MARTINEZ, City Clerk,

by /s/ Illegible
Deputy.

Approved NOV 10 1988

/s/ Tom Bradley
Mayor.

File No. C.F.87-0964-S3

LAJ 363166 11/14

This Ordinance published in Daily Commerce on 11/11/88.

Civil No.
2nd Civil No. B 114226
LASC No. BC 008240

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

SYED MOUZZAM ALI,

Plaintiff, Respondent and Cross-Appellant,

vs.

THE CITY OF LOS ANGELES,
A Municipal Corporation,

Defendant, Appellant and Cross-Respondent.

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY HONORABLE LAWRENCE W. CRISPO, JUDGE

PETITION FOR REVIEW

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I

PETITION FOR REVIEW

TO THE HONORABLE CHIEF JUSTICE OF CALIFORNIA AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

The CITY OF LOS ANGELES, appellant below, respectfully petitions for review pursuant to Rule 28, California Rules of Court, following the published decision of the Court of Appeal, Second Appellate District, Division 4, filed December 28, 1999. (Appendix).

II

ISSUES PRESENTED FOR REVIEW

A landowner files a lawsuit challenging the denial of a permit as being in violation of state law. Judgment is entered against the landowner based on his failure to exhaust administrative remedies. Following this defeat, the landowner files an administrative appeal with the government agency, obtains the permit, and then files a new action for damages in inverse condemnation based on the earlier erroneous permit denial.

Is a landowner entitled to damages for a regulatory taking based on a non-final decision reversed by the government agency through its own development approval process?

May a landowner pursue damages for a regulatory taking without first succeeding in setting aside the government agency's decision through a judicial determination in a mandamus proceeding?

Can an action of a government agency that exceeds its statutory authority be a compensable taking?

III

THIS CAUSE IS APPROPRIATE FOR REVIEW

The issues presented by this petition are appropriate for review by this Court pursuant to Rule 29(a)(1), California Rules of Court. Review by this Court is necessary in order to secure uniformity of decision and to settle important questions of law. This case presents questions of significant importance to all levels of government within the State of California. This case presents important questions of law which have not been, but should be, settled by this Court.

Before the opinion of the Court of Appeal in this matter, a landowner could only base a claim in inverse condemnation on a final action of a government agency. (See *Williamson Planning Comm'n v. Hamilton Bank* (1985) 473 U.S. 172 ,87 L. Ed. 2d 126, 105 S. Ct. 3108; *First Lutheran Church v. Los Angeles County* (1987) 482 U.S. 304, 96 L. Ed. 2d 250, 107 S. Ct. 2378 (hereafter *First English*); *Agins v. Tiburon* (1980) 447 U.S. 255, 65 L. Ed. 2d 106, 100 S. Ct. 2138; *Hensler v. City of Glendale* (1994) 8 Cal. 4th 1; and *Mola Development Corporation v. City of Seal Beach* (1997) 57 Cal.App. 4th 405.)

Despite the rule concerning "finality," the Court of Appeal decision, citing the opinion of this Court in *Landgate, Inc. v. California Coastal Com.* (1998) 17 Cal. 4th 1006, held that the landowner in this case could obtain damages in inverse condemnation based on a decision that

was reversed after the landowner exhausted his administrative remedies. The Court of Appeal has opened the door for plaintiffs to seek damages whenever there is any error by a government agency during its own development approval process.

Government agencies should not be compelled to defend litigation based on decisions which the agencies themselves reverse during the course of their own development approval processes. The Court of Appeal's ruling will expose cities, counties, the state and other state public bodies to inverse condemnation claims brought by landowners who have neither obtained final administrative decisions on their entitlement requests, nor exhausted available administrative or judicial remedies. Initial or preliminary erroneous government actions would therefore be the subject of lawsuits seeking damages in inverse condemnation, even if these decisions are not final and have not been otherwise invalidated by the courts.

It is important that the Supreme Court issue a ruling regarding the ability of landowners to seek compensation based on erroneous decisions that are corrected by government agencies through their own development approval processes.

IV

STATEMENT OF FACTS

On November 17, 1988, the Ferraro Hotel was the scene of a major alarm fire, which resulted in substantial

property damage and rendered the structure uninhabitable. (JA[1], XIV, p. 3741, ¶ 5.) Inspectors from the Department of Building and Safety conducted an inspection of the property the same day (RT[2], 523:20-525:20) to determine whether the premises were safe for entry or occupancy. (RT, 526:1-6.) After the inspection, Orders to Comply were posted on the property ordering, *inter alia*, that the building be vacated and the premises secured. (JE[3]2 and 3.) The inspection determined that the hotel was approximately 35 per cent fire damaged, mostly to the top floor and roof. (JE, 4-1; RT, 543:9-544:11.)

On December 16, 1988, Ali entered into an agreement with Fred Harouni to sell the Ferraro Hotel[4]. (JE 135.) The sales agreement was handwritten by Fred Harouni and required, *inter alia*, that the property "be demolished to original level." (RT, 254:4-9.) Fred Harouni believed that the contract required Ali to obtain a demolition permit and that Harouni would have the building demolished. (RT, 255:8-18.)

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[1] Joint Appendix In Lieu of Clerk's Transcript, followed by the Roman Numeral of the volume and then the page or pages. Volumes I through X contain the Administrative Record and the trial proceedings up to the first appeal, B 077712. Volumes XI through XIV constitute the proceedings following the remittitur filed September 22, 1995.

[2] Reporter's Transcript on Appeal, followed by the page number and the line or lines.

[3] Joint Exhibit. The parties stipulated to the admission of numerous exhibits at trial. JE followed by the exhibit number conforms to the numbering sequence used at trial.

[4] Fred Harouni assigned his interest in the property to the Alvarado 6 Partnership, remaining a principal in the partnership. (RT, 248:11-17 and 259:3-4.)

On January 19, 1989, Ali applied for a demolition permit. (JE 55-5; RT, 84:17-28.) Based upon information provided by Ali, the supervising engineer of the Structural Plan Check Division believed that the Ferraro Hotel was a single room occupancy (SRO) hotel and was subject to a moratorium on the demolition of such buildings. (JA, XIII, p. 3626, ¶¶ 2-6.) Based upon this information, he advised the plan checker assigned to the application, that the Ferraro may be an SRO hotel. (Edwards Deposition, 15:2-24.) Because there was insufficient information to determine whether this was or was not a SRO hotel, the plan checker wrote corrections requiring compliance with the SRO ordinance. (*Id.* at 19:6-14; 44:18-25; 47:23-48:3.) Ali did not file an administrative appeal.

The SRO Ordinance

In order to preserve the stock of low cost housing, the City adopted Ordinance No. 164 175 (JE 122), which placed a moratorium on demolition permits for SRO hotels.

The ordinance provided that the City Council could grant a hardship exemption from the provisions of the ordinance "in cases of extreme hardship duly established to the satisfaction of the City Council." (JE 122-3.) Applications for a hardship exemption were to be filed with the Rent Stabilization Division of the Community Development Department. (*Id.*) Appeals or requests were handled administratively, investigated, and heard before an independently retained professional hearing officer who would render a written decision. (JA, XIII, p. 3702, ¶ 4; RT, 397:26-399:7.)

During 1989, Division staff and its director spent considerable time with Ali explaining the hardship exemption process, and the director mailed him an application (RT, 405:27-405:19; JA, XIII, p. 3703, ¶ 6), which he did not file. (RT, 405:20-21; JA, XIII, p. 3703, ¶ 6.) At no time during these conversations did Ali state or imply that the Ferraro was not a SRO hotel. (RT, 406:2-5; JA, XIII, p. 3703, ¶ 6.)

On August 10, 1989, the Department issued an Order to Comply at the Ferraro Hotel, (JE 18), stating that because the hotel was repeatedly fire damaged, Ali was required to secure the building and all accessible openings from entry. The order also required Ali to obtain the services of a licensed private security guard company to maintain a 24-hour security watch on the property.

When Ali did not comply with that order, pursuant to authorization by the Council, City personnel entered the property to secure the building and commence a fire watch utilizing a private security service. City personnel gave Ali's attorney the appeal forms necessary to challenge all aspects of the City's action, including the placement of security guards on the property. (RT, 460:8-28; 492:13-493:12, 460:27-461:13.) No administrative appeal was filed. (RT, 489:18-25.)

Litigation in *Ali I*

Instead of exhausting available administrative remedies, Ali filed a petition for a writ of mandate in Superior Court on September 6, 1989, *Ali v. City of Los*

Angeles (C736585) [hereafter *Ali I*][5], alleging that he had applied for a demolition permit for the Ferraro Hotel, (First Amended Complaint in *Ali I*, page 2:28 to 3:1-2) that it "is not an S.R.O. Hotel" within the definition of the SRO Ordinance; (First Amended Complaint in *Ali I*, p. 7:9-14), and that the SRO Ordinance violated the Ellis Act, Govt. Code '7060, et seq. (First Amended Complaint in *Ali I*, p. 4:16-19.).

In its demurrer, the City established that Ali had received a list of corrections required by the Department of Building and Safety prior to issuing a demolition permit for the Ferraro Hotel, including compliance with the SRO Ordinance. However, the City pointed out that any determination by the Department can be appealed; and that this right of appeal would include whether a building is or is not a SRO hotel subject to the provisions of the SRO Ordinance. The City also urged that the First Amended Complaint was subject to demurrer because Ali failed to exhaust available administrative remedies. (Memorandum of Points and Authorities In Support of Demurrer and Request For Judicial Notice [Demurrer]), pp. 7:25 to 8:18 and 5:18 to 6:17).

Further, the City noted that Ali claimed that the SRO Ordinance as it is being applied by the Department in this instance was unconstitutional because the SRO ordinance in the words of the First Amended Complaint attempts to

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[5] Copies of the complaint and the City's successful demurrer in that case are attached hereto as Appendix A and Appendix B, respectively, to the Petition for Rehearing in this case.

circumvent and preempt a legitimate state interest, of the Ellis Act. (First Amended Compliant, p. 7:9-14).

The City disputed this legal contention. The City argued that the Ellis Act did not prohibit a municipality from enacting an ordinance regulating the issuance of demolition permits. Rather, the Ellis Act only prohibits a public entity from compelling the owner of residential real property to offer the property for rent or lease; and because the SRO ordinance did not compel Ali to offer his property for rent or lease, the SRO ordinance as applied to Ali did not run contrary to the Ellis Act. (Demurrer, p. 12:1-17)

In *Ali I*, the trial judge, Judge Zebrowski accepted the City's legal arguments. The judgment in *Ali I* held that the City had the legal right to require exhaustion of administrative remedies as part of the development approval process in this instance. (JE 187) Ali did not appeal this judgment.

Ali Finally Pursues His Administrative Remedies

After losing *Ali I*, Ali retained a new attorney, and finally pursued his administrative remedies by filing an appeal with the Department of Building and Safety. (JE 184.) Hearings were held on May 31, 1990, before the Department's Advisory Appeals Board, and on June 12, 1990, before the Board of Building and Safety Commissioners. (JA, XIV, p. 3745, ¶¶ 36 and 37.)

During these hearings, Ali for the first time provided information indicating the Ferraro was not a SRO Hotel (RT, 407:15-21). A permit was issued on August 8, 1990,

(JA, XIV, p. 3745, ¶ 41) and demolition of the Ferraro Hotel started the next day. (JA. XIV, p. 3756, ¶ 42.)

V

PROCEDURAL HISTORY OF THE PRESENT CASE

Ali commenced this lawsuit seeking a Petition for Writ of Administrative Mandate to reverse the City's determination to impose lien assessments for the costs of the fire watch at the Ferraro Hotel, and damages for deprivation of civil rights, interference with contract, and trespass. (JA, I, pp. 17-40.)

Proceedings in *Ali II* Relating to the Assessment Liens

Ali applied for a writ of mandate to require the City to set aside its lien for the cost of the fire watch. (JA, X, pp. 2796-2801.) In an unpublished opinion filed on May 9, 1995, the Court of Appeal reversed the trial court's denial of the writ with respect to the lien assessment issues and remanded the case for further proceedings (JA, XI, 2884-2895). After remittitur, Judge O'Brien granted the writ.

Proceedings in *Ali II* Relating to the Inverse Condemnation Cause of Action

A court trial on the "takings" issues was held before Superior Court Judge Lawrence Crispo (JA, XIV, p. 3748.) The court ruled that the City's action placing a fire watch at the Ferraro Hotel constituted a physical taking. (JA, XIV, p. 3830.) It also ruled that the initial denial of the

demolition permit for the Ferraro Hotel constituted a regulatory taking. (JA, XIV, p. 3829.)

It was undisputed by the parties that there was a delay in the issuance of a demolition permit between January 1989 and August 1990. Judge Crispo found as an historical fact that this delay was due to a misclassification of the property as a SRO hotel. In ruling on the regulatory taking claim, Judge Crispo made no mention of the Ellis Act. Ruling on Ali's cause of action for inverse condemnation, Judge Crispo found that: "The City's initial designation of the Ferraro as an SRO was erroneous. The SRO ordinance prevented the immediate demolition of the Ferraro. . . . " (JA, XIV, p. 3829.)

Judge Crispo also made the following findings about the character of the City's actions:

> "[T]he City's actions were not oppressive nor do they shock the conscience. While the actions of the City's employees were negligently performed, there is no credible evidence that they deliberately sought to deprive Mr. Ali of his due process rights. On the contrary, the court finds that they acted in good faith. Finally, the City's action, though misguided, was an attempt to further legitimate interests in protecting both its zoning integrity and the public." (JA, XIV, p. 3896.)

The trial court awarded damages for the taking in the amount of $1,179,821.00. (JA, XIV, p. 3897.) Both the City and Ali appealed.

The Court of Appeal Decision

The appeal was heard by Division Four of the Second Appellate District. On December 28, 1999, the Court issued an opinion upholding the Superior Court's determination that there had been a regulatory taking, stating: "We conclude that the judgment in favor of Ali in inverse condemnation should be affirmed on the ground that the City's wrongful denial of a demolition permit between January 1989 and August 1990 in violation of the Ellis Act effected a temporary regulatory taking of Ali's property." (Appendix, p. 4.)

VI

ARGUMENT

A. A Regulatory Taking Claim Cannot Be Based on a Non-final Decision Reversed by the Government Agency Through its Own Development Approval Process.

In *Ali I*, the Superior Court found that Ali had failed to exhaust his administrative remedies and that his challenge to the City's initial denial of a demolition permit was not ripe for judicial review.

As this Court recognized in *Landgate, Inc. v. California Coastal Com.* (1998) 17 Cal. 4th 1006, 1018 (hereafter *Landgate*), a landowner may only seek just compensation with respect to a final action of a government agency:

> "[T]he [United States] Supreme Court has emphasized that the question whether property has been taken is not ripe for decision until a

> government agency has rendered a final decision on the use to which the property in question may be put. Our reluctance to examine taking claims until . . . a final decision has been made is compelled by the very nature of the inquiry required by the Just Compensation Clause. Although the question of what constitutes a "taking" for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty [citation], this Court consistently has indicated that among the factors of particular significance in the inquiry are the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations. [Citations.] Those factors simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question. (*Williamson Planning Comm'n v. Hamilton Bank (1985) 473 U.S. 172, 190-191 [105 S. Ct. 3108, 3118-3119, 87 L. Ed. 2d 126]*; see also *MacDonald, Sommer & Frates v. Yolo County (1986) 477 U.S. 340, 348 [106 S. Ct. 2561, 2565-2566, 91 L. Ed. 2d 285].)*" (interior quotation marks omitted)

The constitutional principles set forth above make it clear that the City's initial permit denial was not a decision that could be made the basis of a takings claim. It was not a final action of the City. Ali obtained a demolition permit after he finally exhausted his administrative remedies.[6] This fact alone indicates that the earlier permit

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[6] The writ of administrative mandate in this case evolves from the assessment hearings for the cost of security at the

denial was not a final action of the City, and therefore cannot be the basis for a claim for damages based on a regulatory taking.

B. *Landgate* Does Not Eliminate the Procedural Prerequisites to An Action In Inverse Condemnation Described in *Hensler*.

In *Hensler v. City of Glendale* (1994) 8 Cal.4th 1 (hereafter *Hensler*), this Court held that before resorting to the courts for just compensation for a regulatory taking, a landowner must first exhaust all available administrative remedies, including obtaining a judicial determination that the government action is invalid. As stated in *Hensler, supra* at pp. 13-14:

> "If the alleged taking is a 'regulatory taking,' i.e., one that results from the application of zoning laws or regulations which limit development of real property, however, the owner must afford the state the opportunity to rescind the ordinance or regulation or to exempt the property from the allegedly invalid development restriction once it has been judicially determined that the proposed application of the ordinance to the property will constitute a compensable taking. . . . The owner 'may not, however, elect to sue in inverse condemnation and thereby transmute an excessive use of the police power into a lawful taking for which compensation in eminent domain must be paid.' (*Agins v. City of Tiburon, supra,* 24 *Cal.3d* 266,

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Ferraro, not from the issues asserted in the inverse condemnation cause of action.

> 273.) Compensation must be paid for a permanent taking only if there has been a final judicial determination that application of the ordinance or regulation to the property is statutorily permissible and constitutes a compensable taking."

It is clear that Ali has not satisfied the basic preconditions to an action in inverse condemnation described in *Hensler*. By failing to appeal the adverse judgment in *Ali I*, the correctness of the original permit denial cannot be the subject of damages for a regulatory taking. *See Mola Development Corporation v. City of Seal Beach* (1997) 57 Cal.App. 4th 405.

Ali's failure to appeal the adverse judgment in *Ali I* is fatal to his claim for damages for inverse condemnation. In the words of this Court:

> "A California landowner, who believes that application of a state statute or local ordinance limiting development of the owner's property works a taking, may not bypass the remedies the state has made available to avoid the taking. If he does so, the state may deem the owner to have waived the "taking" claim. (*County of Imperial v. McDougal (1977) 19 Cal.3d 505, 510-511. . . .* " (*Hensler,* supra 8 Cal.4th 1, 19)

Nevertheless, the Court of Appeal decision excuses Ali's failure to comply with *Hensler* by suggesting that these preconditions do not apply when the landowner is attacking the government agency's authority to act. The Court of Appeal stated:

> "It is the City's position that timely exhaustion of administrative remedies is a necessary part of the normal development process, citing *Hensler v. City of Glendale (1994) 8 Cal. 4th 1, 876 P.2d*

> *1043.* This argument does not apply to the circumstances of this case. . . . [A]dministrative review of the determination whether the Ferraro was an SRO hotel is irrelevant. Whether or not the Ferraro was an SRO hotel, Ali was entitled under the Ellis Act to demolish it and go out of the SRO hotel business. . . . We are not reviewing the classification of the Ferraro as an SRO hotel, but rather the City's legally erroneous invocation of its SRO ordinance against Ali in violation of the Ellis Act. The City may not simply delay development by fabricating an irrelevant dispute about whether the Ferraro was an SRO hotel. (*Landgate, supra, 17 Cal. 4th at p. 1029.)*" (Appendix, pp. 13-15)

To the contrary, a landowner who believes that the action of the government agency is in excess of its jurisdiction is the very landowner who must afford the governmental agency the opportunity to change course.

The Court of Appeal has misinterpreted *Landgate*. The owner in *Landgate* wanted to build a large home in Malibu. The County of Los Angeles had given the owner's predecessor in interest a lot line adjustment some years before *Landgate* acquired the property. In October 1990, the owner sought a permit from the Coastal Commission to construct a large home which the Commission ultimately denied in February 1991. One ground for the denial was that, because the lot line adjustment had not been approved by the Commission, it was invalid. In March 1991, the owner sought a writ of mandate asserting that the Commission had no jurisdiction over the lot line adjustment. The action included a complaint for inverse condemnation. The writ petition was granted by the trial court in October 1991, and the Court

of Appeal affirmed in December 1992. Those courts concluded that the Commission's determination concerning the lot line adjustment was erroneous as a matter of state law. On remand, the Commission approved Landgate's project in February 1993. The owner then moved for summary judgment on the takings claim, asserting that the lot line adjustment dispute prevented it from making any economical viable use of the property from February 1991 to February 1993. The trial court granted Landgate's motion, agreeing that all economically viable use of the property was temporarily denied because building permits could not be obtained. The Court of Appeal affirmed.

This Court reversed, concluding that the delay was a normal part of the regulatory process. In reaching this conclusion, this Court stated:

> "The present case poses the issue of whether a legally erroneous decision of a government agency during the development approval process resulting in delay constitutes a temporary taking of property. Virtually every court that has examined the issue has concluded, for various reasons and under various theories, that a regulatory mistake resulting in delay does not, by itself, amount to a taking of property." (17 Cal.4th 1018)

This Court then expanded on this theme, saying:

> "We substantially agree . . . that an error by a governmental agency in the development approval process does not necessarily amount to a taking even if the error in some way diminishes the value of the subject property, any more than the commission of state law error during a

> criminal trial is an automatic violation of the due process clause. . . . But government land use regulations and decisions . . . , which, despite their ultimately determined statutory defects, are part of a reasonable regulatory process designed to advance legitimate government interests, are not takings of property. . . . " (17th Cal.4th at 1020-1021)

As was the case in *Landgate*, the City's original denial of the demolition permit was part of a "reasonable regulatory process designed to advance legitimate government interests" and therefore it was not a taking.

Landgate and *Hensler* must be read together. *Hensler* requires the landowner first to obtain a final government decision. Second, the landowner must obtain a judicial determination that the decision is in error. Finally, the landowner must afford the government agency the opportunity to change its final decision.

Landgate logically follows from *Hensler*. It addresses questions of proof that may arise in a properly prosecuted action in inverse condemnation. *Landgate* makes clear that the landowner must prove more than that the public agency committed error during decisionmaking is part of the normal development approval process.

C. The City's Permit Denial Was Not So Unreasonable to Lead to the Conclusion That It Was Taken Only for Delay.

This Court in *Landgate* recognized that there are circumstances in which the time needed to judicially resolve an alleged government error will not be recognized as part of the normal development process. That is so when

the government's action is "so unreasonable from a legal standpoint as to lead to the conclusion that it was taken for no purpose other than to delay the development process." *Landgate, supra* at p. 1024. The Court of Appeal determined that the City should have known that its ordinance violated the Ellis Act and that its denial of the demolition permit met that standard of unreasonableness. Its determination in that regard totally ignores the trial court's finding of fact that, although the City's actions "were negligently performed, there is no credible evidence that they deliberately sought to deprive Mr. Ali of his due process rights. To the contrary, the trial court finds that [the City] acted in good faith." (JA, XIV, p. 3896.) The Court of Appeal came to its conclusion, at least in part, based on its assumption that the City never challenged the contention that its actions violated the Ellis Act. Of course, there is no basis for that conclusion. The City's compliance with the Ellis Act was addressed by the City in its demurrer in *Ali I.* (See Statement of Facts above.)

D. An Action of a Government Agency That Exceeds its Statutory Authority Is Not a Compensable Taking.

The core finding of the Court of Appeal is that the City's original action exceeded its authority under state law.

However, takings liability can only be founded upon government action that is within the statutory authority of the government agency. If the aggrieved landowner contends that the action of the government agency is in

excess of that agency's statutory authority, then the landowner must raise such a claim in the form of a due process claim. The takings clause cannot be used to evaluate claims that governmental action constitutes an unauthorized exercise of authority. See *Eastern Enterprises v. Apfel* (1998) 524 U.S. 498, 96 L.Ed. 2d 451, 118 S.Ct. 2131.

E. State Law Preemption Disputes Are a Normal Part of the Development Approval Process.

The Court of Appeal decision holds that the delay in demolition caused by the erroneous enforcement of the SRO ordinance was not a "normal" delay in the development process, because in its view such enforcement efforts were in conflict with the prohibitions of the Ellis Act. This conclusion was wrong.

At issue here is the City's requirement that Ali comply with the City's SRO ordinance in 1989. In August 1990, Ali obtained his demolition permit after it was finally determined that the Ferraro Hotel was not a SRO hotel. The City successfully defended the SRO ordinance against charges that it violated the Ellis Act in *Ali I*. The City argued that the Ellis Act did not prohibit a municipality from enacting an ordinance regulating the issuance of demolition permits. Rather, the Ellis Act only prohibits a public entity from compelling the owner of residential real property to offer the property for rent or lease; and because the SRO ordinance did not compel Ali to offer his property for rent or lease, the SRO ordinance as applied to Ali did not run contrary to the Ellis Act. (Demurrer, p. 12:1-17.)

Even assuming that the City's enforcement efforts were preempted by state law, in *Del Oro Hills v. City of Oceanside* (1995) 31Cal.App.4th 1060, the Court of Appeal held that violation of state law, without more, does not result in a taking. There, plaintiff sought, *inter alia*, damages because an invalid residential growth control initiative caused it to lose money on the sale of real property. The Court rejected plaintiff's efforts, noting that the invalidity of the statute did not convert it into an unconstitutional taking of property. An invalid regulation is not necessarily an unconstitutional one. *Id.* at 1080.

The United States Constitution does not call for the payment of just compensation just because a public agency makes a mistake in the development approval process. *First Lutheran Church v. Los Angeles County (1987) 482 U.S. 304, 96 L. Ed. 2d 250, 107 S. Ct. 2378.* Takings cases recognize that there is no liability for delays which may occur while a determination on an application is being reached. (See *Landgate, Inc. v. California Coastal Com. (1998) 17 Cal. 4th 1006, 1030; Guinnane v. City and County of San Francisco (1987) 197 Cal. App. 3d 862, 865, 869-870.)* Liability for delay in processing a development proposal may only be imposed when it goes "beyond that to be expected as part of the normal permit process." (*Hensler, supra* at p. 15.) The process includes the period in which a government agency deals with "threshold questions that must be resolved before it can be determined whether a development should be permitted to proceed." (*Landgate, supra,* at p. 1030.)

This Court has recognized that resolution of such threshold questions "often turns on the construction and application of complex statutory schemes and results in

significant delays in the development process." (*Id.*) Notwithstanding the lengthy interval which may pass while such issues are resolved, the interval is not compensable because " 'the mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking' [Citation.]" (*Id. at p. 1027.)*

State law preemption questions are threshold questions which must often be resolved in the development approval process. For example, see *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725; *Griffin Dev. Co. v. City of Oxnard* (1985) 39 Cal.3d 256; *The Pines v. City of Santa Monica* (1981) 29 Cal.3d 656) Because the City's possible misconstruction of its authority in light of the Ellis Act arose in the context of the normal permit process, it was not a taking of property for which just compensation must be paid.

F. The City Has A Legitimate Interest In The Enforcement of the SRO Ordinance.

Contrary to the Court of Appeal decision, the City's interest in the supply of low income housing is a legitimate government interest.

The maintenance of an adequate housing supply is a substantial and legitimate governmental interest. *Griffin Development Co. v. City of Oxnard* (1985) 39 Cal.3d 256, 264: *Nash v City of Santa Monica* (1984) 37 Cal.3d 97, 109. Housing availability is of vital statewide importance, and local governments have the responsibility to make adequate provisions for the housing needs of all economic segments of the community. Govt. Code § 65580, subd. (a)

and (d); see also Govt. Code § 65913 [Legislative declaration that there exists a severe shortage of affordable housing]. The City's actions in this matter were objectively keyed to a legitimate state interest. Under these circumstances, the initial SRO determination, although subsequently determined to be in error, substantially advanced some legitimate state interest.

The City's ordinance (Ordinance No. 164175, JE 122) regulating the demolition of SRO hotels served a legitimate state interest: the preservation of low income housing. The maintenance of an adequate housing supply is a substantial and legitimate governmental interest. *Griffin Development Co. v. City of Oxnard* (1985) 39 Cal.3d 256, 264; *Nash v. City of Santa Monica* (1984) 37 Cal.3d 97, 109. Ali, like the plaintiff in *Del Oro*, has failed to meet his burden to show that the ordinance, although invalid under state law[7], , promoted no legitimate state interest.

Further, there is no showing that Ali was denied all economically viable use of his property. It is well-settled that where, as here, compensation is claimed because of diminished property values, the inquiry focuses on the uses of the property which remain. *Guinnane, supra,* 197 Cal.App.3d at 868. Interim valuation fluctuations during the government decision making process do not result in a taking. *Id.* at 869. Even a substantial diminution in

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[7] In the prior decision, B 077712, the Court of Appeal held that the application of Ordinance No. 164175 to the Ferraro Hotel was in conflict with the Ellis Act, Government Code section 7060.7, subdivision (1).

value does not constitute a taking. See, *Long Beach Equities, Inc. v. County of Ventura* (1991) 231 Cal.App.3d 1016, 1036 and the cases cited therein.

Although there was a delay in the sale of his property to Harouni, Ali did sell to the original purchaser. The final sales price was $2,350,000.00 (RT, 69:8-20). Ali was not denied the economic use of his property, and there was a significant public interest in the SRO ordinance. Therefore, the Court of Appeal's determination of a regulatory taking is clearly erroneous and must be set aside by this court.

CONCLUSION

The issues raised by this petition are of vital importance to public agencies and landowners throughout the State. As such the City respectfully asks that the Court grant review of this matter.

Dated: February 4, 2000

Respectfully submitted,

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LASC No. BC 008240

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION

SYED MOUZZAM ALI,

Plaintiff, Respondent and Cross-Appellant,

vs.

THE CITY OF LOS ANGLES, A Municipal Corporation,

Defendant, Appellant and Cross-Respondent.

APPEAL FROM THE SUPERIOR COURT OF
LOS ANGELES COUNTY
HONORABLE LAWRENCE W. CRISPO, JUDGE

PETITION FOR REHEARING

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CITY OF LOS ANGELES

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Authorities Omitted In Printing]

INTRODUCTION

Respondent, City of Los Angeles, petitions this Court for a rehearing pursuant to **Rule 27, California Rules of Court.** Rehearing is sought on the grounds that this Court, in its opinion filed December 28, 1999 [hereafter Opinion] made factual findings which conflict with the factual findings, both express and implied by the unappealed final judgement in the 1989 case of *Ali v. City of Los Angeles* (C736585) [hereafter Ali I];[1] that this Court, in the Opinion made factual findings which conflict with the factual findings, both express and implied of the trial court below; and that the established facts of this case do not support the trial court's legal conclusions.

DISCUSSION

The Opinion at pp. 14-15 contains the following purposed findings of fact.

> (1) "The City has never disputed the unenforceability of the SRO ordinance in light of the Ellis Act nor claimed a good faith mistake. . . . "
>
> (2) "The City's delay of the demolition was so unreasonable from a legal standpoint as to be arbitrary and not in furtherance of any legitimate governmental objective. Therefore the delay incurred by the City's insistence that the

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[1] A copy of the complaint and the City's successful demurrer in that case is attached hereto as Appendix A and Appendix B, respectively, to this petition for rehearing.

> SRO classification precluded issuing a demolition permit, including the ensuing litigation, were not simply normal delays in the development process."

The judgement in Ali I precludes this court from making any of the above findings.

A. The Opinion Conflicts With Judge Zebrowski's Unappealed Decision In Ali I.

In Ali I, plaintiff alleged that he applied for a demolition permit for the Ferraro Hotel in January, 1989, (First Amended Complaint, page 2:28 to 3:1-2). Ali also alleged that the Ferraro Hotel "is not an S.R.O. Hotel" within the definition of the SRO Ordinance. (First Amended Complaint, p. 4:16-19.).

In its demurrer the City established that Ali had received a list of corrections required by the Department of Building and Safety prior to issuing a demolition permit for the Ferraro Hotel, including compliance with the SRO ordinance. However the City pointed out that any determination by the Department can be appealed; and that this right of appeal would include the determination on whether a building is or is not an SRO hotel subject to the provisions of the SRO ordinance. The City also urged that the First Amended Complaint was subject to demurrer because Ali failed to exhaust available administrative remedies. (Memorandum of Points and Authorities In Support of Demurrer and Request For Judicial Notice [Demurrer]), pp. 7:25 to 8:18 and 5:18 to 6:17).

Further, the City noted that Ali claimed that the SRO Ordinance "as it is being applied by the Department in this instance was unconstitutional because the SRO ordinance in the words of the First Amended Complaint "attempts to circumvent and preempt a legitimate state interest," of Government Code § 7060, et seq., commonly referred to as the Ellis Act. (First Amended Compliant, p. 7:9-14).

The City disputed this legal contention. The City argued that the Ellis Act did not prohibit a municipality from enacting an ordinance regulating the issuance of demolition permits. Rather the Ellis Act only prohibits a public entity from compelling the owner of residential real property to offer the property for rent or lease; and because the SRO ordinance does not compel Ali to offer his property for rent or lease, the SRO ordinance as applied to Ali did not run contrary to the Ellis Act. (Demurrer, p. 12:1-17) In Ali I, the trial judge, Judge Zebrowski accepted the City's legal arguments.

The judgment in Ali I held that the City had the legal right to require exhaustion of administrative remedies as part of the development approval process in this instance. (JA 187) Plaintiff did not appeal this judgment. Therefore it is res judicata on the issue of what was the legally required development approval process in connection with Ali's request for a demolition permit. *Tensor Group v. City of Glendale* (1993) 14 Cal.App.4th 154; *Patrick Media Group, Inc. v. California Coastal Commission* (1992) 9 Cal.App.4th 592.

After the judgement in Ali I, all the parties relied on that decision. Plaintiff exhausted his administrative

remedies and the City granted him a demolition permit. Plaintiff is not entitled to have this court rewrite these historical events to fit with plaintiff's current claim that these cause of events violated federal constitutional rights.

B. The Opinion Contains Findings Of Historical Fact Which Conflict With The Findings Of Historical Fact Made By Judge Crispo.

It is undisputed by the parties that there was a delay in the issuance of a demolition permit between January 1989 and August 1990. However Judge Crispo found as an historical fact that this delay was due to a misclassification of the property. Judge Crispo, in ruling on plaintiff's regulatory taking claim made no mention of the Ellis Act whatsoever. Judge Crispo, in ruling on Ali's cause of action for inverse condemnation found that: "The City's initial designation of the Ferraro as an SRO was erroneous. The SRO ordinance prevented the immediate demolition of the Ferraro . . . " (JA, XIV, p. 3829)

In so finding, the trier of fact rejected the finding sought by plaintiff at trial. At trial plaintiff urged the trier of fact to find that the delay in the issuance of a demolition permit was due the a violation of the state Ellis Act. Plaintiff argued at trial as follows:

"Ali's "taking" lawsuit is NOT based on the fact the the Ferraro [Hotel] was improperly classified an SRO. It is based on the fact that even if it were an SRO, denying permission to demolish any apartment building (even an SRO) is a violation of the Ellis Act and a taking of one's property." (JA, XIII, p. 3585).

Judge Crispo's finding of fact rejects plaintiff's attempt to rewrite history. The trial court's factual finding is based on the finding about the actual historical events surrounding the City's initial refusal to issue a demolition permit. Substantial evidence supports this finding of fact. The actual historical events show that during the delay period all the City players as well as plaintiff Ali, his lawyers, lobbyists, attorneys and other representatives were concerned about the classification or the misclassification of the Ferraro Hotel. (See the actions described in Appellant's Opening Brief, pp. 3-4 and 14-15) At no time during the delay period did plaintiff contend that he was entitled to a demolition permit under the Ellis Act even if the Ferraro was an SRO.

In that complaint plaintiff alleged that the Ferraro was not an SRO and that the Ellis Act gave him the right to demolition permit.

Further as pointed out above, the City successfully argued in Ali I that this factual dispute over classification could be resolved by exhaustion of administrative remedies. This decision was not appealed by plaintiff. It is still binding on the parties and thus cannot form the basis of a taking claim. The Ali I decision is final and may not be relitigated even if this court does not necessarily endorse its reasoning or conclusions.

Finally, Judge Crispo made the following findings about the character of the City's actions:

"[T]he City's action were not oppressive nor do they shock the conscience. While the actions of the City's employees were negligently performed, there is no credible evidence that they deliberately sought to deprive Mr.

Ali of his due process rights. On the contrary, the court finds that they acted in good faith. Finally, the City's action, though misguided, was an attempt to further legitimate interests in protecting both its zoning integrity and the public." (JA, XIV, p. 3896)

While this finding of historical fact may not fit in with plaintiff's current theory of constitutional deprivation based on a violation of the Ellis Act, plaintiff is not entitled to have history rewritten. The development approval process centered around a dispute over the correct classification of the Ferraro Hotel. Once plaintiff appealed the City's initial erroneous determination and proved that the City had indeed misclassified the Ferraro, he received the permit he was entitled to.

C. **Delay Attributed To Administrative Appeal Process Is An Incident Of Ownership Which Cannot Be Considered A Taking.**

An applicant is aggrieved by an initial determination. The applicant files an administrative appeal and gets relief thought [sic] the administrative process.

This scenario is probably repeated thousands of times in a year in the State of California. In California the filing of an administrative appeal is a basic element of the land use decisionmaking process.

The fact that an applicant could develop a legal theory by which exhaustion of administrative remedies could conceivably be short circuited does not change the character of land use decision making in the State of

California. Indeed it is not unusual for aggrieved applicants on appeal to raise arguments based on state statutes, the state constitution, federal statutes and the federal constitution as well.

These claims however are usually based on factual contentions that can be proven or disproven during the administrative appeal process. Often the applicant can get relief through the administrative appeal process without having to go to court to resolve issues of state or federal law. Such is the nature of the land use approval process in California.

It is simply a bad idea to suggest or imply that aggrieved applicants should abandon the administrative appeal process and go straight to superior court with all their statutory and constitutional claims in the first instance. Moreover, such a suggestion is wholly inconsistent with the well established jurisdictional requirement that one exhaust administrative remedies prior to resorting to the court. *Abelleria v. Dist. Ct. of Appeal* (1941) 17 Cal.2d 280, 292.

Such a procedure would surely overwhelm the superior courts. It would tax the resources of applicants who would have to decide what claims they should pursue administratively and which ones they should file in the first instance in superior court. City officials would also be overwhelmed with the task of having to review all claims by all applicants before a hearing on an administrative appeals. They would be compelled to make decisions on the merits of the aggrieved applicants claims without having a throughly [sic] developed administrative record before them.

Further, such an approach would do little to instill public confidence in local government. Those interested persons entitled to notice and hearing on appeal hearings would find decisions being made in the proverbial "back-room" without any public input.

In *First Lutheran Church v. Los Angeles County* (1987) 482 U.S. 304, 96 L.Ed.2d 250, 107 S.Ct. 2378, the Supreme Court indicated that a governmental regulation which deprives a landowner of all economically viable use of the land may constitute a regulatory taking of property which requires just compensation under federal constitutional law. In *Landgate, Inc. v. California Coastal Com.* (1998) 17 Cal.4th 1006, (hereafter *Landgate*), the California Supreme Court held that the duty to provide just compensation did not extend to the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like. Further, the court concluded that such a regulatory mistakes resulting in delay does not result in a taking. (17 Cal.4th p. 1018-1022)

Landgate is dispositive and compels this court to set aside the judgment of the trial court and enter judgment on behalf of the City. In the present case plaintiff's filing of an administrative appeal lead to the reversal of the City's initial erroneous decision and the issuance of a demolition permit. The trial court found the City's actions were in good faith. The record shows that City staff went the extra mile to ferret out the true facts and give plaintiff the permit he was entitled to receive under the City's own ordinances. Even though issues raised during the approval might rise state law questions, this normal process of administrative appeal and reversal of

administrative error may take place without giving raise to a federal constitutional claim for relief.

D. The Opinion Must Be Modified.

It is clear from this review of the proceedings in Ali I and the findings of historical fact made by Judge Crispo in the trial on the inverse condemnation claim that:

1. In Ali I, the City successfully defended the enforceability of the SRO ordinance in light of the Ellis Act. In the face of plaintiff's Ellis Act claim, the City's position was that exhaustion of administrative remedies could lead to the issuance of a demolition permit. It is an undisputed historical that exhaustion of these remedies did lead to issuance of the requested demolition permit.

2. There was a good faith factual dispute over the correct classification of the Ferraro Hotel. The City delayed issuance of a demolition permit until plaintiff proceeded to exhaust his administrative remedies with respect to the classification issue. The City's approach was upheld by Judge Zebrowski in Ali I. Even if this court does not now endorse the decision in Ali I, plaintiff is bound by this decision.

3. As Judge Crispo expressly found, the City acted in good faith in an attempt to further legitimate interests in protecting both its zoning integrity and the public.

To the extent the Opinion suggests otherwise, it is erroneous and should be modified.

CONCLUSION

Based on the foregoing, respondent City of Los Angeles respectfully requests this Court to grant rehearing of the issues raised in this petition.

Dated: January 11, 2000

Respectfully submitted,

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EXHIBIT A

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

SYED MOUZZAM ALI, Plaintiff/Petitioner, vs. CITY OF LOS ANGELES, a Municipal corporation, Los Angeles City Department of Building and Safety, DOES 1 Through 100, Inclusive, Defendants/ Respondents,	Case No. C 736 585 FIRST AMENDED COMPLAINT FOR: 1.) DECLARATORY AND INJUNCTIVE RELIEF; 2.) PETITION FOR WRIT OF MANDATE 3.) ATTORNEYS FEES; 4.) NEGLIGENCE; 5.) FORCIBLE ENTRY; 6.) FORCIBLE DETAINER; 7.) QUIET TITLE; 8.) INTERFERENCE WITH CONTRACT; 9.) NEG. INFL. EMOTIONAL DISTRESS

COMES NOW THE PLAINTIFF/PETITIONER, SYED MOUZZAM ALI, who complains and alleges as follows:

PRELIMINARY ALLEGATIONS

1.) Plaintiff is and at all times mentioned herein has been an individual residing within the City of Los Angeles, County of Los Angeles, State of California.

2.) Defendant CITY OF LOS ANGELES (hereinafter referred to as the "CITY") is and was at all times mentioned herein a public agency.

3.) Defendant LOS ANGELES CITY DEPARTMENT OF BUILDING AND SAFETY (hereinafter referred to as "DEPARTMENT") is and was at all times mentioned a public agency charged with certain duties including the issuance of demolition permits for buildings within the City of Los Angeles.

4.) Defendants sued herein as DOES 1 THROUGH 100, INCLUSIVE, are individuals and/or entities who have contributed to the injuries and damages the plaintiff has sustained, and who the plaintiff at the present time does not know their true names and capacities, thus they are being sued by such fictitious names, however when the true names and capacities of said defendants are ascertained, plaintiff will amend this complaint/petition to reflect same.

5.) At all times mentioned herein each of the defendants was the agent, employee and/or servant of each and every other defendant and was acting within the purpose and scope of said agency, employment and/or servitude with the full knowledge and permission of each and every other defendant.

6.) At all times mentioned herein, plaintiff was and currently is the owner of certain improved real property

known as the Ferraro Hotel, located at 2065 West Sixth Street, Los Angeles, (hereinafter referred to as the "PROPERTY").

7.) On November 17, 1988, the "PROPERTY" was severely damaged by fire and as a result thereof, the "CITY" through the "DEPARTMENT" issued an "ORDER TO COMPLY" (order number A 95162) ordering plaintiff, to amongst other things, "Demolish and remove the remaining portion of the building that is damaged beyond repair."

8.) Thereafter in or about January, 1989 plaintiff applied to the "DEPARTMENT" for a demolision [sic] permit as the entire building was beyond repair.

9.) On or about February 13, 1989 the "DEPARTMENT" issued and "ABATE ORDER" ordering plaintiff to demolish the "PROPERTY".

10.) Thereafter the "DEPARTMENT" under orders from the Los Angeles City Council refused to act on the application for a demolition permit.

11.) On or about March 16, 1989 the "DEPARTMENT" issued a second "ABATE ORDER" superceding the first "ABATE ORDER" and which ascertained that the "PROPERTY" was repariable [sic] despite the fact that since November 17, 1988 there have been multiple fires, further damaging the "PROPERTY" and making it economical unfeasible, if not totally impossible to repair.

12.) On or about August 10, 1989 the "DEPARTMENT" issued another "ORDER TO COMPLY" (Order number K 93158) ordering plaintiff to secure the building and all openings from entry from the exterior of the

building and maintain same secured and the "CITY" by resolution of the Los Angeles City Council order the "DEPARTMENT" to secure the property and maintain security at the "CITYS" expense with the lien for costs and expenses for such action attaching to said "PROPERTY"

13.) The "CITY" thereafter barred plaintiff from all access to his "PROPERTY".

14.) It was plaintiffs intention in seeking a demolition permit to remove the "PROPERTY" as a public hazard and due to the numerous fires, go out [sic] business as a landlord for both residential and commercial tenants.

15.) The "CITY" and the "DEPARTMENT" have refused to process plaintiffs application for a demolition permit because they contend:

A.) The "PROPERTY" is an S.R.O. (Single Room Occupancy) Hotel as defined by Los Angeles City ordinance 162,663 as extended by Ordinances 163, 182, 163, 622, 164, 175 and Ordiance [sic] 164,827 which was in force at the time plaintiff applied for the demolition permit, and under such ordinances no S.R.O. Hotel may be demolished except to comply with an order issued by the "DEPARTMENT" when and if the "DEPARTMENT" has determined any such building is "infeasible to repair."

B.) The "DEPARTMENT" contends that the "PROPERTY" is feasible to repair.

16.) There is no legal basis for the "CITY" and the "DEPARTMENT" to refuse to process plaintiffs application for a demoliton [sic] permit because:

A.) The "PROPERTY" is not an S.R.O. Hotel within the definition of an S.R.O. Hotel by Los Angeles City Ordinance 164,827 which defines such buildings as those being:

> "An apartment building, hotel or other structure containing six or more guest rooms in which thirty percent (30%) or more of the units do not contain a private bath and toilet facility within the unit"

As the "PROPERTY" contained units in which less than thirty percent (30%) of them did not contain a private bath and toilet facilities;

B.) The "PROPERTY" has been virtually destroyed 100% and is totally infeasible to repair.

17.) The "CITY" has advised plaintiff that the only way that it would process his application would be by plaintiff agreeing to replace the "PROPERTY" with a like number of resident units that would be classified as low-cost housing.

18.) Plaintiff does not desire to go into the residential real estate rental business and simply desires to go out of business and be able to sell the land under the "PROPERTY", when demolished, on the open market.

19.) Plaintiff has not filed any appeal of the actions of the "DEPARTMENT" because:

A.) His application for a demolition permit was never denied, but simply not processed;

B.) The City has no process to appeal the refusal to process an application for a demolition process but only to request modification of building ordinances and/or

request for alternative material or method of construction;

C.) Any such appeals, even if available, would be futile as the "CITY" has already indicated it would deny such appeals.

20.) Plaintiff has fully complied with all requirements to obtain a demolition permit.

FIRST CAUSE OF ACTION AGAINST ALL DEFENDANTS FOR DECLARATORY AND INJUNCTIVE RELIEF

21.) Plaintiff repeats and realleges each and every allegation contained in paragraphs 1-20, above, and incorporates same herein by reference as though set forth fully at length.

22.) Plaintiff has no other plain adequate or speedy remedy at law and will sustain continued irreparable and irremedial injuries and damages unless this Court issues a Preliminary Injunction and then a Permanent Injunction requiring the "CITY" and the "DEPARTMENT" to issue plaintiff a demolition permit without him having to agree to rebuild the "PROPERTY" in any form or manner.

23.) Monetary damages are inadequate as the "CITY" is continuing to incur daily expenses which they are attempting to pass on to plaintiff by way of an involuntary lien on the "PROPERTY" to secure and guard the "PROPERTY" with absolutely no end in sight.

24.) The actions of the "CITY" and the "DEPARTMENT" have resulted in the plaintiff sustaining irreversible injuries and daily loss of thousands of dollars which

would not be sustained if he were able to demolish the "PROPERTY", and sell his interest in the ground under the "PROPERTY" and unless the relief requested herein is granted such hardship and damages will be exascerbated [sic] to the point where plaintiff will be financially ruined and emotionally and physically destroyed.

25.) Plaintiff will also sustain irremedial and irreparable injuries and damages and be forced to file and defend a multiplicity of legal actions unless this court declares the "PROPERTY" not to be an S.R.O. HOTEL within the meaning of Los Angeles City Ordinance 164,827 and any temporary and/or permanent ordinances extending said ordinance and further unless this court declares the "PROPERTY" infeasible to repair.

SECOND CAUSE OF ACTION AGAINST ALL DEFENDANTS FOR A WRIT OF MANDATE

26.) Plaintiff repeats and realleges each and every allegation contained in paragraphs 1-25, above, and incorporates same herein by reference as though set forth fully at length.

27.) Plaintiff/Petitioner has no administrative remedies in that the "CITY" and the "DEPARTMENT" have improperly defined the "PROPERTY" as an S.R.O. Hotel and any further appeals, even if available, would be futile as under said definition Los Angeles City Ordinance 164,827 would control the right of any appellate agency to overturn the refusal to process the demolition application.

28.) Los Angeles City Ordinance 164,827 as is being applied by the "CITY" and the "DEPARTMENT" in this

instance is unconstitutional as it attempts to circumvent and preempt a legitimate state interest, namely the "ELLIS ACT" (Government Code section 7060 et seq.), which allows a lessor of residential real estate to go out of business if he so chooses.

29.) The continued insistance [sic] by the "CITY" and the "DEPARTMENT" to require plaintiff to agree to rebuild the "PROPERTY" into low-cost residential units before it will issue him a demoliton [sic] permit will cause plaintiff to suffer irreparable and irreparable injuries and damages and ultimately cause him to lose all interest he currently has in the "PROPERTY" and the ground upon which it is situated on.

30.) Defendants have a mandatory duty to refrain from refusing to process and/or delay processing of the application for the demoliton [sic] permit and no such permit should be denied as a result of the Los Angeles City Ordinance 164,827 or any other ordinance extending said ordinance.

31.) Defendants refusal to process and then grant the demolition permit is arbitrary, capricious and an abuse of its discretion.

32.) Plaintiff has no other plain, speedy nor alternative remedy at law in that monetary damages will be insufficient to relieve plaintiff of the severe burdens and hardship imposed upon him by defendants/respondents unjustified actions.

33.) It is thus necessary that this court issue a Writ of Mandate commanding the defendants/respondents to process plaintiffs application for a demolition permit and

upon plaintiff completing all of the necessary steps to obtain such permit, to issue a permit to allow plaintiff to demolish the "PROPERTY".

34.) Plaintiff has filed a claim for tort damages against the "CITY" which is pending and will seek to amend this complaint petition upon the "CITY" rejecting said claim.

THIRD CAUSE OF ACTION AGAINST ALL DEFENDANTS FOR ATTORNEYS FEES

35.) Plaintiff repeats and realleges each and every allegation contained in paragraphs 1-34, above, and incorporates same herein by reference as though set forth fully at length.

36.) If successful herein, plaintiff/petitioner in bringing this action will result in the enforcement of an important public interest in that a significant benefit will be conferred on the general public and/or a large class of persons.

37.) The necessity and financial burden of private enforcement of this important right are such as to make an award of attorneys fees under CCP section 1021.5, appropriate and such fees should not in the interest of justice be paid out

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EXHIBIT B

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SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES

SYED MOUZZAM ALI, Plaintiff/Petitioner, vs. CITY OF LOS ANGELES, a municipal corporation, LOS ANGELES CITY DEPARTMENT OF BUILDING AND SAFETY, Does 1 through 100, Inclusive, Defendants/Respondents.	CASE NO. C 736-585 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER AND REQUEST FOR JUDICIAL NOTICE **HEARING:** Date: November 28, 1989 Time: 8:30 a.m. Place: Department 15

[Table Of Contents And Authorities Omitted In Printing]

I.

INTRODUCTION

Plaintiff/petitioner Syed Mouzzam Ali ("Ali"), the owner of the Ferraro Hotel, located at 2065 West Sixth Street, seeks injunctive relief and a writ of mandate from this Court commanding Defendant/respondent City of Los Angeles ("City") and the Department of Building and Safety ("Depatment") to issue a demolition permit and allow Ali to demolish the Ferraro Hotel, which has been damaged by a string of mysterious fires since November, 1988.

Ali also seeks a declaration that the Ferraro Hotel is infeasible to repair and not a Single Room Occupancy ("SRO") Hotel covered by the SRO Hotel Demolition Moratorium Ordinance ("SRO Ordinance", see Exhibit A,[1] Ordinance No. 164,827). Furthermore, Ali seeks to [sic] quiet title to the Ferraro Hotel and damages from the City for negligence, forcible entry, forcible detainer, interference with contract, and negligent infliction of emotional distress.

The First Amended Complaint is premature because Ali has failed to allege that he has exhausted the administrative remedies available through either the SRO Ordinance or the Los Angeles Municipal Code ("LAMC"). Ali also has failed to allege facts sufficient to constitute a

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[1] All Exhibits are attached to the Request for the Court to Take Judicial Notice.

cause of action, and the First Amended Complaint is uncertain. Finally, Ali cannot maintain several causes of action because the City is immune from liability pursuant to the Government Code ("G.C.").

II.

STATEMENT OF FACTS

A. Factual Background

Ali alleges that he applied for a demolition permit for the Ferraro Hotel in January, 1989, subsequent to a fire on November 17, 1988 (First Amended Complaint, page 2: lines 22-28, p. 3: 1-2). Ali received, in February, 1989, a list of corrections required by the Department prior to issuing a demolition permit for the Ferraro Hotel (see application for a demolition permit and corrections, Exhibit B).

Ali also alleges that he received several orders from the Department regarding the Ferraro Hotel (First Amended Complaint, p. 2: 22-27, p. 3: 3-4, 8-21; see Department orders, Exhibit C.). Ali does not allege that he either complied with any of the corrections required by the Department or that he appealed any determination of the Department, including the orders or corrections, to the Board of Building and Safety Commissioners ("Board").

Ali further contends that the Ferraro Hotel "is not an S.R.O.). Hotel" within the definition of the SRO Ordinance. (First Amended Complaint, p. 4: 16-19.) However, the SRO Ordinance contains a procedure that would allow an owner to apply for an exemption from its provisions at any time. Despite these facts, Ali fails to allege in

the First Amended Complaint that he ever applied for an exemption from the City Council pursuant to the procedures outlined in the SRO Ordinance (Exhibit A. p. 5).

Furthermore, Ali alleges that the City negligently breached a duty to grant him a demolition permit and that the City forcibly entered and detained the Ferraro Hotel. (First Amended Complaint, pp. 9-12.) Ali maintains these allegations despite the fact that he failed to secure the unsafe Ferraro Hotel after repeated orders by the Department over a period of nine months (Exhibit C).

B. SRO Ordinance

The Ferraro Hotel was subject to the SRO Ordinance until the ordinance expired on midnight, September 5, 1989, the day before Ali filed the original Complaint.[2] This ordinance established a moratorium on the issuance of a demolition permit for any SRO hotel for 120 days. This moratorium allowed the City additional time to examine the problems and potential solutions to the threatened loss of irreplaceable SRO hotels, the housing source for many low-income and homeless persons.

The SRO Ordinance provided two administrative avenues for an owner to gain relief from the moratorium and obtain a demolition permit. First, a demolition permit could be issued to comply with an order by the Department pursuant to LAMC §§ 91.8903 or 91.8905 (see

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[2] A similar SRO Ordinance (Ordinance 165,145) replaced the ordinance that is the subject of this Complaint. The new SRO Ordinance is similar to the old ordinance, but it has a substantially different hardship exemption procedure.

Exhibit A, p. 4: 9-19). This procedure allows for the demolition of an SRO building which is either infeasible to repair or an immediate hazard to the public.

The second avenue for obtaining a demolition permit is a hardship exemption from the City Council. An owner of an SRO building is required to submit an application for a hardship exemption with the Rent Stabilization Division of the Community Development Department ("CDD"), and this application is forwarded to the City Council for a final determination (see Exhibit A, p. 5: 1-10). An exemption from the SRO Ordinance may be granted in cases of extreme hardship so established to the satisfaction of the Council.

C. The LAMC

Any determination by the Department can be appealed pursuant to LAMC §§ 91.8906(c)(3) and 98.0403(2)(a). This right of appeal would include the determination that a building is an SRO, infeasible to repair, or the imposition of a lien against a property (see LAMC provisions, Exhibit D).

III.

THE DEMURRER BY DEFENDANT MUST BE GRANTED SINCE ALI HAS FAILED TO ALLEGE FACTS SUFFICIENT TO EITHER INVOKE THE JURISDICTION OF THIS COURT OR TO CONSTITUTE A CAUSE OF ACTION

The sole basis for this action is the First Amended Complaint filed without any supporting declarations or affidavits. The First Amended Complaint is subject to

demurrer because Ali has failed to allege that he exhausted the available administrative remedies. Furthermore, Ali has failed to allege facts sufficient to constitute a cause of action.

A. This Court Is Without Jurisdiction Because Ali Failed To Exhaust His Administrative Remedies.

California courts have consistently held that before a person may obtain injunctive or mandamus relief from a decision of an administrative agency, that person must first exhaust all available administrative remedies provided under the appropriate ordinances. *Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 292; *Green v. City of Oceanside* (1987) 194 Cal.App.3d 212, 219; *Grant v. Superior Court* (1978) 80 Cal.App.3d 606, 608; *Friends of Lake Arrowhead v. Board of Supervisors* (1974) 38 Cal.App.3d 497, 503; *Concerned Citizens of Palm Desert, Inc. v. Board of Supervisors* (1974) 35 Cal.App.3d 272, 279; 3 Witkin, *California Procedure* (3d ed. 1985) § 234, pp. 264-266.

Furthermore, California courts are without jurisdiction to act on a complaint until all of the available administrative remedies have been completely exhausted. *County of Contra Costa v. State of California* (1986) 177 Cal.App.3d 62, 77. Failure to exhaust an administrative remedy is a jurisdictional, not a procedural, defect and dismissal is proper when a court lacks jurisdiction. *Wilkinson v. Norcal* (1979) 98 Cal.App.3d 307, 318. As outlined by the court in *Roth v. City of Los Angeles* (1975) 53 Cal.App.3d 679, 686, this principle has been stated as follows:

> " 'If an administrative remedy is provided by statute, it must be invoked and exhausted before judicial review of the administrative action is available. [Citations.] The rule is not a matter of judicial discretion, but rather is a jurisdictional prerequisite.' *Abelleira v. District Court of Appeal* (1941) 17 Cal.2d. 280, 293."

The rationale for the rule has been explained by the Court in *Hayward v. Henderson* (1979) 88 Cal.App.3d 64, 70, as follows:

> "The administrative claim or 'cause of action' is within the special jurisdiction of the administrative agency, and the courts may act only to review the final administrative determination. Allowing a suit prior to such a final determination would constitute interference with the subject matter jurisdiction of another tribunal. Accordingly, the exhaustion of an administrative remedy is a jurisdictional element in California."

1. Hardship Exemption From SRO Ordinance

Under the SRO Ordinance, Ali could apply at any time for a hardship exemption from the City Council. In order to properly exhaust his administrative remedies, Ali must allow the City Council, the final administrative decision-making body, to vote upon his hardship exemption. Since the First Amended Complaint fails to allege that an application for a hardship exemption was ever filed with CDD and considered by the City Council, Ali has failed to exhaust the single most important administrative remedy available.

2. Appeals Pursuant to the LAMC

Also, under the LAMC § 98.0403(2)(a), the Board has the jurisdiction to:

> "Hear and determine appeals from determinations, orders or actions of the Department or the Superintendent of Building pertaining to enforcement of codes under the jurisdiction of the Department."[3] (See Exhibit D.)

Ali admits in the First Amended Complaint that he has not filed any such appeal from the actions of the Department of Building and Safety (First Amended Complaint, p. 5: 7-8). Furthermore, Ali fails to allege in his First Amended Complaint that he attempted to comply with the corrections required by the Department in order to obtain a demolition permit (see Exhibit B). Moreover, Ali has not alleged that he attempted to appeal any determination of the Department, including: (1) a determination that the Ferraro Hotel is an SRO and repairable; (2) the allegation by Ali that the Department has refused to process his demolition permit application; or (3) the imposition, if any, of an assessment lien against the Ferraro Hotel. Therefore, it is clear that Ali has failed to exhaust his administrative remedies and that this demurrer should be sustained.

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[3] The Department is granted the power by City Charter § 90 to "enforce all ordinances and laws relating to the construction, alteration, repair, and demolition, or removal of buildings or structures in the city". See Exhibit E, City Charter § 90.

3. Quiet Title Action

Ali alleges in the Seventh Cause of Action (quiet title) that the City "with malice and without any legal justification" filed assessment liens against the Ferraro Hotel in order to pay for a private security guard and to secure the structure (First Amended Complaint, pp. 13-14). This cause of action is subject to demurrer because Ali did not allege that he had objected to this assessment, if any has been recorded, pursuant to the hearing procedure outlined in LAMC § 91.8906 (see Exhibit D).

Section 91.8906 of the LAMC states in relevant part:

> "**1. Assessment Against the Property.** Whenever the Department, . . . has caused the . . . securing of any building, structure, or portion thereof or any premises, the Department shall proceed to have all such costs . . . assessed against the property. . . . " (LAMC § 91.8906(b)(1).)

> "**3. Protest, Objections and Hearing.** Any person to whom notice is mailed, who receives a notice, or who otherwise is interested in or affected by the proposed assessment may appear in person or by counsel and/or may file a written protest or objection with the City Clerk. . . . " (LAMC § 91.8906(3).)

Without an allegation that Ali has appealed any alleged assessment(s) levied against the Ferraro Hotel, he has not exhausted his administrative remedies. If, contrary to the allegations of Ali, no assessments have in fact been levied against the Ferraro Hotel, then this Cause of Action is clearly moot. Either way, this Seventh Cause of Action is subject to demurrer.

Since Ali has failed to exhaust his administrative remedies by not appealing the determinations of the Department, including any assessment liens, and failing to file for a hardship exemption from the City Council, this Court is without proper jurisdiction to hear this First Amended Complaint. Therefore, pursuant to C.C.P. § 430.10(a), this demurrer should be granted without leave to amend.

B. The First Amended Complaint Does Not State Facts Sufficient To Constitute A Cause Of Action

1. The First Amended Complaint Is Moot Because the SRO Ordinance Expired Prior to the Filing of This Action

A court will generally refuse to review the decision of an administrative body when the subject matter of the case has become moot. *Callie v. Board of Supervisors* (1969) 1 Cal.App.3d 13, 18; *Hake v. City of Bakersfield* (1942) 49 Cal.App.2d 174, 175.

The original Complaint was filed by Ali on September 6, 1989, the day after the SRO Ordinance that is being challenged by Ali expired. Although another ordinance regarding SRO hotels was adopted by the City Council, the SRO Ordinance which is the subject matter of this case was not in effect when Ali filed the original Complaint. Furthermore, even though Ali has knowledge of the new SRO Ordinance, he has failed to allege such facts in the First Amended Complaint.

Therefore, pursuant to C.C.P. § 430.10(e), the First Amended Complaint by Ali does not state facts sufficient

to constitute a cause of action and this demurrer should be granted without leave to amend.

2. An Action for Interference With Contractual Rights is Improperly Alleged

Ali attempts to allege in the Eighth Cause of Action that the City intentionally interfered with his contractual rights (First Amended Complaint, pp. 14-15). This Cause of Action is deficiently pleaded because Ali has failed to include vital elements to substantiate this allegation.

The elements of an action for interference with a contract or prospective contractual relation include " 'the pecuniary loss of the benefits of the contract or the prospective relation. . . . ' " 6 Witkin, *Summary Cal. Law* (1988) § 1440, p. 114. It is also necessary in an allegation respecting tortious interference with prospective advantage to allege that the defendant "knowingly usurped" the relationship. *Rickel v. Schwinn Bicycle Co.* (1983) 44 Cal.App.3d 648.

In the First Amended Complaint, Ali does not allege any legally protected contractual relationship with which the City interfered, nor does he allege any particular prospective relationship. *Worldwide Commerce, Inc. v. Fruehauf Corp.* (1978) 84 Cal.App.3d 803, 810-811. Furthermore, Ali does not allege that the City knowingly interfered with any prospective relationship with the intent to attain an unjust advantage. *Rickel, supra,* at p. 658; see also, *Seaman's Direct Buying Service, Inc. v. Standard Oil Co.* (1984) 36 Cal.3d 752. Therefore, the First Amended Complaint fails to state a cause of action for interference with contractual rights by the City.

3. The SRO Ordinance Does Not Violate the Ellis Act

Ali claims that the SRO ordinance "as is being applied by the 'CITY' and the 'DEPARTMENT' in this instance is unconstitutional" because the SRO ordinance "attempts to circumvent and preempt a legitimate state interest," of G.C. § 7060, et seq., commonly referred to as the Ellis Act. (First Amended Complaint, p. 7: 9-14.)

This allegation is incorrect because the Ellis Act does not prohibit a municipality from enacting an ordinance regulating the issuance of demolition permits. The Ellis Act only prohibits a public entity from compelling the owner of residential real property to offer the property for rent or lease (see Exhibit F, G.C. provisions). Since the SRO ordinance does not compel Ali to offer his property for rent or lease, the SRO ordinance does not run contrary to the Ellis Act. Without the allegation that the SRO ordinance violates the Ellis Act, the First Amended Complaint is without sufficient fact to constitute a cause of action. Therefore, this demurrer should be granted without leave to amend.

IV.

THE FIRST AMENDED COMPLAINT IS SUBJECT TO DEMURRER BECAUSE THE CITY IS IMMUNE PURSUANT TO THE GOVERNMENT CODE

A. Government Code Sections 818.4 and 818.6 Provide Immunity Against Allegations Of Negligence.

Ali alleges in the Fourth Cause of Action that the City was negligent in failing to act on or grant the demolition permit and for failing to conduct any reasonable building inspections of the

* * *

2nd Civil No. B 114226
LASC No. BC 008240

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION

SYED MOUZZAM ALI,

Plaintiff, Respondent and Cross-Appellant,

vs.

THE CITY OF LOS ANGLES [sic], A Municipal Corporation,

Defendant, Appellant and Cross-Respondent.

APPEAL FROM THE SUPERIOR COURT OF
LOS ANGELES COUNTY
HONORABLE LAWRENCE W. CRISPO, JUDGE

APPELLANT'S OPENING BRIEF

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Authorities Omitted In Printing]

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VI. ARGUMENT

A. THERE WAS NO PHYSICAL TAKING.

The trial court erroneously found that the City's action in securing the Ferraro Hotel to prevent arson fires constituted a physical taking under the authority of *Loretto v. Teleprompter Manhattan CATV* (1982) 458 U.S. 419, 73 L.Ed.2d 868, 102 S. Ct. 3164. (JA, XIV, p. 3830.) The facts in *Loretto*, however, make it clearly distinguishable. New York law required landlords to permit cable television companies to install their cables and ancillary equipment on their property. Under those circumstances, the government essentially created an easement in Loretto's property for the benefit of a third party (Teleprompter), and no matter how small an area the cable equipment occupied, a taking had therefore occurred requiring just compensation.

Requiring a property owner to permanently allow a cable company to place cable equipment on the property is not the same as instituting a fire watch at an uninhabited structure to prevent arson fires. The latter is a valid exercise of the police power to protect public safety and it has long been held that any loss arising therefrom are *damnum absque injuria* which do not give rise to a cause of action. *Gray v. Reclamation District No. 1500* (1917) 174 Cal. 622, 640-641. Correctly, there is no physical taking, where, as here, the government undertakes an action to remedy a threat which the property owner has been

unable to remedy. *Brown v. State of California* (1993) 21 Cal.App.4th 1500 [no inverse condemnation cause of action where the state entered property to undertake cleanup of toxic wastes to prevent water pollution and to protect the health and safety of the surrounding residents].

The evidence (see, Part II A and B, *ante*) established that the security provided by Ali at the Hotel was totally inadequate, and, as a result, the property was the subject of numerous arson fires in a very short period of time. Both Captain George and Tharpe's testimony established that the Ferraro was not secured and easily accessible to transients and the scene of numerous fires. Ali does not dispute this. The firefighters, transients and the surrounding neighborhood were placed in danger every time a fire broke out. It is clear that Ali was not up to the duty placed on him to keep his property in a reasonably safe condition. See, *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.App.4th 666, 674. Having clearly established that (1) there were numerous arson fires, (2) the building was accessible to transients, (3) there was considerable risk to life and property from the fires and the hazardous condition of the building, and (4) securing the property was necessary, the City responded appropriately by boarding up the building and placing a fire watch at the hotel.

The City's actions did not cause any damage to the property. Mr. Hilton, Ali's financial advisor, testified that the City's action of August 17, 1989, did "no damage whatsoever to the property." (RT, 65:8-14.) Even if there had been damage, the courts have consistently held that "property damage incidentally caused by the action of

public employees in the pursuit of their duties" is not a taking. *Customer Co. v City of Sacramento* (1995) 10 Cal.4th 368, 378. Indeed, the court's ruling places appellant in the rather anomalous situation of having "taken" property which it preserved and did not damage, when it could have substantially damaged the property in the exercise of its police power without having "taken" the property. *The National Board of Young Men's Christian Associations v. United States* (1969) 395 U.S. 85, 23 L.Ed. 117, 89 S.Ct. 1511 [no taking for damage done by rioters after forcing army to take shelter in building which was further damaged by the rioters after the army was forced to retreat]; *Customer Co, supra,* [no compensation for property damage caused by police using tear gas in order to apprehend a fleeing felon].

Moreover, there was no intended use or enjoyment by the public. "To make a use public in character, a duty must fall on the person or corporation holding the property appropriated by eminent domain to furnish the public with the *use* intended and the public must be entitled to *use or enjoy the property taken." Brown v. State of California, supra,* 21 Cal.App.4th at p. 1504; internal quotations and citation omitted; emphasis in the original. Like the cleanup of toxic waste in *Brown,* there was no intended use or enjoyment by the public here. To the contrary, what was intended was to prevent unauthorized entry and to protect the structure, transients, firefighters and the neighborhood from the onslaught of repetitive arson fires. Fire prevention falls unambiguously within the definition of the police power, the City's research revealed no case that remotely suggests that the prevention or

suppression of fires is not a valid exercise of the police power.

Lastly, the City's action did not prevent Ali or his representatives from access to the property. Mr. Hilton testified that he had been granted access to the property on many occasions. (RT, 61:20-65:2.) He was on the site with one of the Harouni's while a soils test was being conducted by Harouni's engineers. (RT, 63:11-28.) Indeed, the Harounis had separate access to the property for their purposes. (RT, 64:27-65:2.) The firm of MacIntosh and MacIntosh entered the property to conduct an appraisal for Ali. (RT, 64:11-16.) Thus, Ali still retained access to the property and its use.

In securing the Ferraro Hotel, the City exercised its police powers to secure a building which was a hazard to the public. The City was forced to act because Ali was unable or unwilling to take the necessary steps to correct the situation and protect the public. There is no cause of action based upon a theory of inverse condemnation, where, as here, the plaintiff has been given ample notice of the problem which must be corrected, and failing to do so, the City is required to act in his stead. *Duffy v. City of Long Beach* (1988) 210 Cal.App.3d 1352, 1358.

The court's determination that there was a physical taking is clearly erroneous and contrary to law.

B. THERE WAS NO REGULATORY TAKING.

1. Ali's Self-Imposed Delay In Seeking His Administrative Remedies Did Not Result In A Compensable Taking.

It is well settled that one must first exhaust all available administrative remedies in order to permit the local government to either rescind a regulation or exempt the property from the regulation before resorting to the courts for just compensation for a regulatory taking. *Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 13-14. Here, Ali was afforded every opportunity to seek administrative review of the determination that the Ferraro Hotel was a SRO hotel and was even mailed or given the necessary forms on at least two occasions. (See, pp. 5 and 13, *ante*.) For whatever reason known but to him, Ali just did not feel the need to do so. Under these circumstances, the resulting self-imposed delay in obtaining the relief he wanted is not a temporary regulatory taking. *Patrick Media Group, Inc. v. California Coastal Commission* (1992) 9 Cal.App.4th 592, 611-612; *Guinnane v. City and County of San Francisco* (1987) 197 Cal.App.3d 862, 870.

The facts here showing self-imposed delay are remarkably similar to the facts in *Guinnane v. City and County of San Francisco, supra*. In *Guinnane*, the plaintiff argued that the City's delay in acting on his building permit (at least four years) was so excessive and unreasonable that it constituted a taking without compensation. The court rejected the argument, ruling that the long delay was necessary for a proper review and study of the application. *Id.* at p. 870. Moreover, the plaintiff was asked by the planning department to submit certain

information in support of the proposed negative declaration and "failed to submit all of the requested information until more than *three years later*, in September 1985." *Id.* at p. 865; emphasis in the original. The plaintiff in *Guinnane* had also prematurely filed a lawsuit before exhausting his remedies[18]. *Id.* The court concluded that the excessive delay was attributable to plaintiff's "conduct and inaction." *Id.* at p. 870. Here, it is quite clear that an early resolution of this dispute was made impossible due to Ali's conduct and inaction, which were described as "inexplicable" by Ms. Zeidman, considering the importance of this to Ali and the information he possessed to support his position. (See, p. 14 and n. 15, *ante.*)

Important in the *Guinnane* court's analysis was, as here, the plaintiff's ability to sell his property during the period of delay as well as the freedom "to sell or develop their property when the proceedings ended." *Id.* at p. 869. The resulting fluctuations in value over time were not a taking in the constitutional sense requiring compensation. *Id.*

The failure to seek administrative review and then to seek compensation on a claim for inverse condemnation is disfavored in the law and contrary to sound public policy. As was stated in *Patrick Media Group, Inc. v. California Coastal Com.* (1992) 9 Cal.App.4th 592, 611-612:

> "A public agency's capacity to plan its actions in the public interest and to make reasonable and responsible allocations of resources that it holds in trust for the public requires the agency be

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[18] In the instant matter, we have a judicial determination that Ali failed to exhaust his administrative remedies. (JE 187.)

> alerted promptly both when its decisions are questioned, and when, as a result of a particular decision, the agency may be liable for inverse condemnation damages. . . . [¶] The requirement that challenges to administrative actions constituting takings be brought initially by administrative mandamus assures that the administrative agency will have the alternate of changing a decision for which compensation might be required. *If no such early opportunity were given, and instead, persons were permitted to stand in the face of administrative actions alleged to be injurious or confiscatory, and three or five years later, claim monetary compensation on the theory that the administrative action resulted in a taking for a public use, meaningful government fiscal planning would be impossible.*" (Emphasis added.)

Here, Ali ultimately obtained the relief he wanted after he finally exhausted his administrative remedies[19]. The delay in obtaining that relief, from the City's perspective, was not only reasonable, it was legally compelled.

2. There Was No Temporary Regulatory Taking Because Ali Retained A Valuable Use Of His Property, And The City's Actions Substantially Advanced A Legitimate State Interest.

The invalidity of a local land use statute or regulation does not, by itself, support a conclusion that the

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[19] The writ of administrative mandate in this case evolves from the assessment hearings for the cost of security at the Ferraro, not from the issues asserted in the inverse condemnation cause of action.

application of an invalid regulation to a property constitutes a temporary regulatory taking. "An invalid regulation is not necessarily an unconstitutional one." *Del Oro Hills v. City of Oceanside* (1995) 31 Cal.App.4th 1060, 1080. In *Del Oro Hills*, a residential growth control initiative conflicted with the City's general plan and violated provisions of the state planning and zoning laws. However, relying on the two pronged test for a regulatory taking in *Agins v. City of Tiburon* (1980) 447 U.S. 255, 65 L.Ed.2d 106, 100 S.Ct. 2138, the *Del Oro* Court held that (1) the plaintiff failed to meet its burden of showing that the invalid regulation promoted no legitimate state interest and was thus facially invalid under the takings standards (31 Cal.App.4th at 1065) and (2) plaintiff failed to show that the enactment deprived the property owner of all economically viable use of its property. *Del Oro Hills, supra*, 31 Cal.App.4th at pp. 1079-1081.

The City's ordinance (Ordinance No. 164175, JE 122) imposing a moratorium on the demolition of SRO hotels served a legitimate state interest: the preservation of low income housing. That interest was a priority for the Councilperson representing the district where the Ferraro was located. (JA, XIII, p. 3681, ¶ 11; Molina deposition, pp. 17, line 21-20, line 6.) The maintenance of an adequate housing supply is a substantial and legitimate governmental interest. *Griffin Development Co. v. City of Oxnard* (1985) 39 Cal.3d 256, 264; *Nash v. City of Santa Monica* (1984) 37 Cal.3d 97, 109. Plaintiff here, like the plaintiff in *Del Oro*, has failed to meet his burden to show that the

ordinance, although invalid under state law[20], promoted no legitimate state interest. Under these circumstances, Ali's remedy is an action to invalidate the ordinance and/or its application to his property. *Del Oro Hills, supra,* 31 Cal.App.4th at p. 1080; accord, *Stubblefield Construction Co. v. City of San Bernardino* (1995) 32 Cal.App.4th 687, 709 ["Even where state officials have allegedly violated state law or administrative procedures, such violations do not ordinarily rise to the level of a constitutional deprivation." quoting from *PFZ Properties, Inc. v. Rodriguez* (1st Cir. 1991) 928 F.2d 28]

Moreover, there is no showing that plaintiff was denied all economically viable use of his property. Although there was a delay in the sale of his property to Harouni, Ali did sell to the original purchaser. Ali even had backup offers for the property, one of which was for more than Harouni's offer. (RT, 44:2-45:10; JE 139.) The final sales price was $2,350,000.00 (RT, 69:8-20), not the $2,700,000.00 stated in the original sales contract. (JE 135.) Davis Harouni testified that the price reduction was caused by three factors: (1) change in the market, (2) street dedication requirements in existence, but not taken into consideration at the time of the original contract in 1988, decreased the buildable area of the parcel, thus reducing its value, and (3) changes in the City's parking requirements reduced the size of the project.

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[20] In the prior decision, B 077712, this Court held that the application of Ordinance No. 164175 to the Ferraro Hotel was in conflict with the Ellis Act, Government Code section 7060.7, subdivision (1).

However, it is well-settled that where, as here, compensation is claimed because of diminished property values, the inquiry focuses on the uses of the property which remain. *Guinnane, supra,* 197 Cal.App.3d at 868. Interim valuation fluctuations during the government decision making process do not result in a taking. *Id.* at 869. One cannot establish a taking merely by showing the inability to exploit a property interest one believed was available. *Terminals Equipment Co. v. City and County of San Francisco* (1990) 221 Cal.App.3d 234, 244. Even a substantial diminution in value does not constitute a taking. See, *Long Beach Equities, Inc. v. County of Ventura* (1991) 231 Cal.App.3d 1016, 1036 and the cases cited therein. To the extent that a portion of the decrease in value was due to the City adopting more restrictive parking requirements, it is a noncompensable regulation which does not result in a taking. *Redevelopment Agency v. Tobriner* (1984) 153 Cal.App.3d 367, 377.

Best summarized, the state of the law and this case is:

> "There is no constitutional right on the part of landowners to develop their property for maximum economic profit, or to receive compensation when land use regulations restrict their ability to do so. As stated by the United States Supreme Court: '[T]he submission that appellants may establish a "taking" simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable.' (Citations omitted.)" *Terminals Equipment, supra,* 221 Cal.App.3d at p. 244.

The enforcement of a City ordinance which was later determined to be in conflict with the Ellis Act does not amount to a taking for public use requiring compensation. Ali was not denied the economic use of his property, and there was a significant public interest in the moratorium ordinance. Moreover, Ali significantly contributed to the continued enforcement of the ordinance by his obstinate refusal to seek administrative review until compelled to do so by the court.

VII. CONCLUSION

For the reasons stated above, there has been no physical or temporary regulatory taking of plaintiff's property as a matter of law and the trial court's determination must be set aside.

Dated: February 18, 1998

Respectfully submitted,

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By /s/ Michael L. Klekner
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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

SYED MOUZZAM ALI, Plaintiff and Petitioner v. CITY OF LOS ANGELES, et al., Defendants and Respondents	CASE NO. BC 008240 **PLAINTIFF'S REPLY BRIEF TO:** **DEFENDANT CITY'S TRIAL BRIEF RE: INVERSE CONDEMNATION** DATE: March 12, 1997 TIME: 8:30 a.m. DEPT: "58" (Filed March 12, 1997)

Plaintiff/Petitioner Ali submits the following reply brief to the City's brief on the issues of Inverse Condemnation.

Defendant's brief raises some disputed issues of law and fact which the court will not be able to be decided until the first phase of the trial. However, there are some issues of law and fact the City has raised as "disputed" which have already been decided by *Ali v. City of Los Angeles,* (1995). 2nd Appellate District, Div. 4 B077712 (Not Published) (Super. Ct. No. BC008240) and, *Ali v. City*

of Los Angeles, (1996) Statement of Decision On Petition For Writ Of Mandate. While these issues were decided against the City, the City is continuing to dispute them on remand.

The issues which have been already decided (and which are now "law of the case" are as follows: 1. The city's refusal to issue the demolition permit in January 1989 was illegal.[1]

2. Since the City's refusal to issue the demo permit was illegal, any resulting costs for private security police to guard the burnt out building for the time period **AFTER** Ali would have demolished the building could **NOT** be charged, to Ali.[2]

3. Ali would have demolished the building on or about January 19, 1989, and the "delay after January 19, 1989 in both issuance of the permit and demolition of the building was due solely to the actions of Respondent City and that no part of the delay in issuance of the permit or demolition of the building is attributable to Petitioner [Ali]."[3]

4. As between the City and Ali, Ali is not liable for any nuisance created by the Ferraro which could have

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[1] See Ali v. City of Los Angeles, (1995). 2nd Appellate District, Div. 4 B077712 (Not Published) (Super. Ct. No. BC008240)

[2] See Ali v. City of Los Angeles, (1995). 2nd Appellate District, Div. 4 B077712 (Not Published) (Super. Ct. No. BC008240)

[3] See Ali v. City of Los Angeles, (1996) Statement of Decision On Petition For Writ Of Mandate.

been avoided by its demolition, since the City illegally refused to allow its demolition.[4]

Ali Disputes The Following Factual Contentions Raised In City's Brief.

a. Ali Failed To Secure The Building Prior To City Occupation.

Ali did not fail to secure the building. The building was secured as well as it could be. Ali is maintaining that the City required him to keep a canopy constructed next to the building which acted like a step ladder for transients to enter the building. The City, upon occupancy of the property, immediately removed that canopy. Other than removing the canopy, the city did not do anything other than Ali was doing to protect the property. Ali contests the City's statement that it was forced to occupy Ali's property to protect the Ferraro, or that Ali failed to secure the Ferraro from transients,

b. The City Invaded The Property To Protect The Building.

The City invaded the property because Molina wanted to insure that the Ferraro would not be further damaged and to force ALI to build low income housing under its SROordinance. The City was not attempting to do anything for ALI, it was furthering its own governmental low income goals. Ali was trying to demolish the

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[4] See Ali v. City of Los Angeles, (1995). 2nd Appellate District, Diva 4 B077712 (Not Published) (Super. Ct. No. BC008240.

building, not preserve it. Ali is NOT suing the city for damage caused to the building.

c. Ali Did Not Properly Secure The Ferraro Hotel.

Ali did everything that could *reasonably* be done to secure the Ferraro. The city initially ordered Ali to board up the building and build a canopy, which Ali did. When it became apparent that transients were getting into the building via the canopy, the City refused to allow Ali to remove it. The City later ordered Ali to post security guards on the property; however, Ali had already posted a security guard on the property. The City replaced Ali's guard with their own. Even that aside, however, the court of appeal in Ali v. City of Los Angeles states that Ali should not be required to post security guards to protect a building which the City has illegally refused to allow the owner to demolish. Whether or not Ali was required to post security guards to satisfy his requirements to properly secure the Ferraro (assuming there are any obligations at all) does not include paying for security guards.

d. There Was An Emergency Which Sanctioned The City's Occupation.

The nuisance condition of the property at the time of the City's occupation was the direct result of the City's actions. The city made the Ferraro a nuisance. The City should not be allowed to argue that its occupation was therefore protected. The City was only abating a nuisance that they themselves created. The law of emergency is set out in *Los Osos Valley Ass v. City of San Luis Obispo* (1994)

30 CA4th 1670 (among Ali's top 13 cases). Basically, the law holds that if there is a true emergency in the occupation of property, then there is no taking. However, if the government enters without giving the property owner notice and an opportunity to be heard about the nuisance, then the government must prove that there was an emergency, that physical possession was required, and that the government acted reasonably in abating it. Clearly, the city cannot have acted reasonably in physically occupying the property to abate a nuisance the city itself created. At least as an exception to the just compensation payment requirement.

The city created the Ferraro nuisance by

(1) not allowing its demolition. The court of appeal has already ruled that the City's refusal was illegal, and therefore Ali was entitled to reimbursement for money he had to pay the City for the cost of the private security guards.

(2) not allowing Ali to remove the canopy. The only reason the City was more successful than Ali in stopping the fires was because the City removed the canopy after they took possession, but would not allow Ali to do the same.

(3) not providing enough City police protection at the property during the time period that Ali was still in occupation of the property. If the City wanted the building to remain standing, and the existence of the building was creating a nuisance, then it was incumbent on the city (and not Ali) to pay for and provide security services.

As stated above, abatement of nuisance law requires that there be a genuine emergency, and that the government action be necessary to abate it. In Ali's case, the City not only boarded up the building, but took possession of the building. It installed security guards on the property. If the City acted "reasonably" then boarding up the building was not enough to stop the transients. This would be an admission by the City that boarding alone was not sufficient to protect the building. It is the City's burden to prove that their physical occupation of the property with the security service (rather than only boarding up the building and NOT taking physical occupation of the property) was required to stop the fires. See City Code section Exhibit # 121-8 which provides for boarding of property but NOT for physical occupation with security guards. The City had taken physical occupation of property only a few times in its entire history. Clearly, boarding without physical occupation, had worked in the past for other properties.

e. There Was No Physical Taking Because Said Occupation Was Not In Conjunction With Any Public Work Of Any Kind.

This is a legal contention. Ali is maintaining that the law states that once the government occupies someone's property a taking has occurred. *Loretto v. Teleprompter Manhattan CATV* (1982) 458 US 419 (physical invasion no matter how small requires just compensation). *Loretto* does not limit this principal [sic] with the a [sic] requirement that the physical invation [sic] has to be related to a public improvement project. City cites *Customer Co. V* [sic] *City of Sacramento* (1995) 10Cal.4th 368, 377-378 for

the proposition that there is not a physical taking under the State of California's constitution, Article 1, Section 19, unless said occupation is in conjunction with the construction, improvement or operation of a public work of any kind. However, the California Supreme Court does not have such a limitation. *Customer Co. V. City of Sacramento* (supra) dealt with a police chance of a fleeing felon and a 2 hour occupation of private property required to apprehend the felon. It did not deal with the more traditional concept of land use restrictions. In that context the court did rule about physical invasions. Approximately a year AFTER *Customer Co. v. City of Sacramento,* the court decided *Erlich v Culver City,* (1996) 12 Cal.4th 858.[5] In *Erlich* the court reviewed a city development related land use condition and reaffirmed physical invation [sic] principals [sic] of *Loretto. Erlich* stated that there were special protections given physical invasions or occupations of real property under the 5th amendment no matter how minute the intrusion, and no matter how weighty the public purpose behind it, referring with approval to *Loretto v. Telepromoter Manhattan CATV* (1982) 458 US 419 and *Lucas V. South Carolina Coastal Council* (1992) 505 U.S. 1003.

This court should note that in *Loretto* the taking was that the City forced the landowner to allow a private cable company install cable on the owner's apartment building. It had nothing to do with any public works project. In addition, there was NO damage to the property whatsoever. Indeed, the cable actually increased the

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[5] This case is relied upon by Ali as one of the top 13 most important cases.

desirability of the property for residential rental purposes.

In Ali's case, the City did occupy the property (either rightly or wrongly) to further its own governmental purpose, i.e. to force Ali to rebuild low income rental units by insuring that the Ferraro was not destroyed. While this alleged governmental purpose was illegal (and would not qualify as a "legitimate" governmental purpose, it does show that the City was acting in its requisite official governmental capacity to create liability under inverse condemnation.

f. There Was No Taking Because Ali Was Not Denied All "Economically Viable Use Of His Land

The city next argues that there was no taking because Ali could have sold the property and gotten some money for it. This is not the test for a physical or regulatory taking. The test for a taking due to as [sic] physical occupation has been set out in *Loretto* (supra) (any physical invation [sic] of property no matter how insignificant). The test for a regulatory taking is set out in a number of recent federal Supreme Court cases, (all cited by Plaintiff in his top 13 list) from *Agins v. Tiburon* (1980) 447 U.S. 255 to *Lucas V. South Carolina Coastal Council* (1992) 505 U.S. 1003. The test is:

> a general land use regulation as applied to particular property effects a taking if the ordinance does **"not substantially advance legitimate state interests, OR denies an owner economically viable use of his land."**

This is a two part test, both of which must be satisfied. As was argued before, the city can NOT prove the SRO ordinance substantially advances legitimate state interests. Indeed the SRO ordinance was in direct violation of state interests.[6] However, the City has not addressed that part. The city has addressed the second part of the test:

> OR denies an owner economically viable use of his land

The city says that since Ali could have "sold" his property he had economically viable use of his land. This is a wrong statement of the law. In each takings case cited by Ali in his top 13, the property owner could have sold his land for something. In *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles* (1987) 482 U.S. 304, the court framed the question as whether or not the questioned regulation denied the owner "all use of its property." In Nollan the plaintiff owned beach lots which he could not build on. He could have clearly sold them to someone for some amount of money. The court focused on the allowable uses (or lack thereof) to determine the issue of lack of economically viable use and investment back expectations. Never has there been a discussion about the sale of property as a "use" which would defeat a taking claim. Otherwise the government could offer some small sum of money to the property owner as payment for the land, and avoid its constitutionally

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[6] This test has been discussed by Ali in his brief. The cases that discuss this test are: Nollan v. Cal Coastal Commission (1987) 483 US 825, Lucas v. South Carolina Coastal Council (1992) 505 U.S. 1003 and Dolan v. Tigard, (1994) 512 U.S. ___, 129 LED 2d 304.

required full value just compensation payment. Property can always be sold for some amount of money. What causes the taking is the lack of economic viable uses for the land.

Ali was denied ALL use of his land from January 1989 to August 1990). During that time period, he could make no use of his property. He could not even occupy the property himself. The Ferraro was destroyed by the fire, and could not be rented out due to its unsafe condition. The city refused to allow Ali to demolish it, or repair it (unless he agreed to rebuild with low income housing).[7] It is undisputed that:

> (1) While the burnt out Ferraro stood, there was NO use to which the property could be put; and,
>
> (2) The only thing which prevented Ali from demolishing the Ferraro was the City's illegal SRO ordinance.

Thus the lack of use was directly related and a result of the City's illegal land use condition. Logically, there has been a taking.

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[7] However, the court of appeals has already declared this requirement to be illegal. Therefore, the City's condition on rebuilding the Ferraro (to allow Ali a use) was illegal. An illegal government condition cannot support a city's denial of property use.

g. Ali Was Responsible For The Delay In Processing The Demolition Permit.

Since Ali is suing for a "temporary" taking[8] the City is arguing that the approximate two year delay in getting the demolition permit is Ali's fault. This is not the law. Initially, it should be noted that the Ellis Act was effective April 1996. Two cases interpreting Ellis were published August and September 1988 (before the November 17, 1988 Ferraro) fire and well before Ali's January 1989 demo permit application.[9] The court of appeal decision in *Ali v. City of Los Angeles* states:

> "The [City of Los Angeles'] SRO ordinance suffers from the same defects as the Santa Monica rent control law in *Javidzad*"

Ali as early as June 1998 identified the SRO ordinance as a violation of Ellis in a letter to Molina. And Ali's first attorney in the first lawsuit filed in August 1989 alleged an Ellis violation in the complaint. Clearly the City was on notice of the Ellis violation.[10]

This very argument (Ali was responsible for the delay) was raised at the court of appeal level and was answered against the City in that decision.

> "The City contends that appellant did not exhaust administrative remedies or timely raise the Ellis Act. We disagree. Appellant raised the

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[8] under the holding of *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles* (1987) 482 U.S. 304.

[9] See *Javidzad v. City of Santa Monica* (1988) 204 CA3d 524, and *City of Santa Monica v. Yarmark*, 203 CA3d 153.

[10] And even if they somehow were not, they have an obligation to know the law.

> Ellis Act in the superior court in his first amended complaint and in one of his trial briefs." (*Ali v. City*, at page 7).

Finally, the City maintains in this "Ali is responsible for delay" argument, that somehow the damages should be less since Ali took so long to give the City information which showed that the Ferraro was not an SRO. However, Ali's "taking" lawsuit is NOT based on the fact that the Ferraro was improperly classified an SRO. It is based on the fact that even if it were an SRO, denying permission to demolish any apartment building (even an SRO) is a violation of Ellis Act and a taking of one's property. So the delay in proving the Ferraro was not an SRO does not go to the "taking" violation at all.

Conclusion

Plaintiff Ali is suing the City of Los Angeles under the theory of inverse condemnation, for damages he sustained due to:

> (1) The City's refusal to issue him a demolition permit starting in January 1989; and
>
> (2) The City's physical occupation of his property starting on August 17, 1898. [sic] Inverse condemnation consists of two different types of takings: First, a "regulatory taking" and Second, a "possessory taking." Normally, most lawsuits deal with one or the other type of taking. In this case, however, both types of takings are involved.

What has been shown in these briefs is that Plaintiff's first rule of taking determination (set out in his opening brief) is just as important as ever.

The **FIRST** established rule is that the determination [of whether or not there is a taking] is a fact-intensive case by case inquiry, with no fixed formula. Each case must be analyzed closely for its own factual nuances.

> "Such forms of [land use] regulation are analyzed by engaging in the "essentially ad hoc, factual inquiries" necessary to determine whether a – regulatory taking has occurred. Kaiser Aetna v. United States, (1979) 444 US 164, 176" *Yee v. City of Escondido*, (1992) 503 U.S. 509, 118 L. Ed 2d., at 166.[11]

But this trial court should not make each and every factual determination all over again. There have been important factual and legal issues already decided by the *Ali v. City of Los Angeles* court of appeal decision. These should not be forgotten. They are "law of the case."

Dated March 10, 1997

Respectfully submitted

/s/ Rosario Perry
Rosario Perry
Attorney For Plaintiff/ Petitioner Ali

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[11] See also *Blue Jeans Equities West v. City* [sic] *San Francisco* (1992) 3 Cal.App.4th 164 "It is settled that any regulation of economic interests which "goes too far" becomes a "taking" under principles of inverse condemnation. Penna. Coal Co. V. Mahon (1922) 260 US 393, 415; However there is no set formula for determining what constitutes a "taking," the courts rely instead on ad hoc, factual inquiries into the circumstances of individual cases.

APPENDIX N

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Attorney for Petitioner/Plaintiff
SYED MOUZZAM ALI

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

SYED MOUZZAM ALI, Petitioner/Plaintiff, v. CITY OF LOS ANGELES, a Municipal Corporation; ACTION GUARD SECURITY INVESTIGATIONS, INTERCON SECURITY and DOES 1 through 100 inclusive, Respondents/ Defendants.	CASE NO. BC 008240 (PROPOSED) SECOND AMENDED COMPLAINT FOR: 1. PETITION FOR WRIT OF ADMINISTRATIVE MANDATE (CCP 1094.5); DAMAGES FOR: 2. DEPRIVATION OF CIVIL RIGHTS; 3. INTERFERENCE WITH CON TRACT [sic]; 4. TRESPASS; 5. NEGLIGENCE; AND 6. INVERSE CONDEMNATION

Petitioner/Plaintiff SYED MOUZZAM ALIi [sic], petitions this Court for a writ of man-date under Code of Civil Procedure, Section 1094.5, directed to re.pondent/ defendant, CITY OF LOS ANGELES, and also by this

verified petition/complaint alleges causes of action against Defendants as follows:

ALLEGATIONS COMMON TO ALL CAUSES OF ACTION

1. Petitioner/plaintiff is an individual, and at all relevant times herein mentioned resided within the City of Los Angeles and was the owner in fee simple of real Property commonly known as 2065 West Sixth Street, situated in the City of Los Angeles, Los Angeles County, California (hereinafter designated as the "Property") and more particularly described as follows:

> Lots 35, 36 and 37 of the extension of Nob Hill Tract, as per map recorded in Book 42, page 56 of Miscellaneous Records of Los Angeles County.

2. Respondent/defendant, CITY OF LOS ANGELES (hereinafter referred to as "City"), is and was at all times herein mentioned, a public entity organized and existing under the laws of the State of California.

3. The Los Angeles City Department of Building and Safety (hereinafter referred to as "Department") is, and was at all times herein mentioned, a branch, department or division of the City and a public agency charged with certain duties, including the issuance of demolition permits for buildings within the City of Los Angeles.

4. Petitioner/plaintiff is informed and believes and thereon alleges that respondent/defendant, ACTION GUARD SECURITY INVESTIGATIONS (hereinafter referred to as "Action Guard"), is a business entity, that, sometime during the period from on or about August 17,

1989 to August 8, 1990, occupied, patrolled and controlled the Property with 24-hour armed personnel thereon.

5. Petitioner/plaintiff is informed and believes and thereon alleges that respondent/defendant, INTERCON SECURITY (hereinafter referred to as "Intercon"), is a business entity, that sometime during the period from on or about August 17, 1989 to August 8, 1990, occupied, patrolled and controlled the Property with 24-hour armed personnel thereon.

6. Petitioner/plaintiff is ignorant of the true names and capacities, whether individual, corporate, associate, or otherwise, of respondents/ defendants sued herein as Does 1 through 100, inclusive, and therefore sues these respondents/defendants by such fictitious names. Petitioner/plaintiff will amend this complaint to allege their true names and capacities when ascertained. Petitioner/plaintiff is informed and believes and thereon alleges that each of the fictitiously named respondents/defendants is negligent or otherwise responsible in some manner for the occurrences herein alleged, and that petitioner/plaintiff's injuries and damages as herein alleged were proximately caused by such respondents/defendants.

7. At all times herein mentioned each respondent/defendant, including Does 1 through 100, was the agent, servant, and employee of each of the remaining respondents/defendants, and in doing the things hereinafter alleged were acting within the purpose and scope of their authority as such agent, servant, and employee, and with the knowledge, permission and consent, express or

implied, of each of the remaining respondents/defendants.

8. On or about November 17, 1988, the Property was severely damaged by fire and as a result thereof, the City, through the Department, issued an order to comply (order #A 95162) ordering petitioner/plaintiff to "Demolish and remove the remaining portion of the building that is damaged beyond repair" The order estimated that the structure had been damaged to the extent of 35%.

9. On or about January 19, 1989, petitioner/plaintiff applied to the Department for a demolition permit. At the time of the application, it was economically infeasible to repair the building due to the extent of the damage.

10. On or about January 31, 1989, and thereafter, the Department, under orders from the City, the Los Angeles City Council and Does 1 through 50, and each of them, refused to act on and/or approve the application for a demolition permit on the basis that it determined that the Property was a single room occupancy hotel and could not be demolished. Petitioner/plaintiff was not apprised of this until June 14, 1989, by letter from City Councilwoman Gloria Molina.

11. On or about February 13, 1989, the Department issued an abate order (order CA 3120H), ordering petitioner/plaintiff to demolish the building on the Property on the basis that it was not repairable.

12. On or about March 16, 1989, the Department issued a second abate order (order #A 3021H) reversing and/or superseding the February 13, 1989 abate order. This March 16, 1989, order determined that the Property

was repairable despite the damage caused by the November 17, 1988, fire.

13. In or about July, 1989, additional fires broke out in the building, and on or about August 10, 1989, the Department issued another order to comply (order #K 93158) ordering petitioner/plaintiff to secure the building and all openings from entry from the exterior of the building and maintain same secured. The City, by resolution adopted by the Los Angeles City Council on August 8, 1989, ordered the Department to secure the Property and maintain a private armed security service at the City's expense with a lien for costs and expenses attaching to the Property. The City then caused to be removed the canopy which petitioner/plaintiff had installed around the building pursuant to City Order in December, 1988. The canopy had been installed to protect pedestrians at a cost to petitioner/plaintiff of $15,751.68.

14. Respondents/defendants, City, Action Guard, Intercon and Does 51 through 100, thereafter barred petitioner/plaintiff from all access to his Property.

15. Petitioner/plaintiff filed a claim for damages with the City on September 6, 1989, pursuant to the California Tort Claims Act as set forth in Government Code Sections 900-978.8.

16. It was petitioner/plaintiff's intention in seeking a demolition permit to remove the structure remaining on the Property because it constituted a public hazard, and to go out of the residential rental business as a landlord, as allowed by Government Code Section 7060 *et seq.*

17. The City, the Department, and Does 1 through 50 refused to grant petitioner/plaintiff's January 19, 1989, application for a demolition permit because the City wrongfully designated the Property an SRO (single room occupancy) hotel. An SRO hotel is defined by Los Angeles City Ordinance 162,663, and extended by Ordinances 163,182, 163,622, 164,175 and 164,827, as:

> "An apartment building, hotel or other structure containing six or more guest rooms in which thirty percent (30%) or more of the units do not contain a private bath and toilet facility within the unit"

18. Under said ordinances, no SRO hotel may be demolished except to comply with an order issued by the Department upon determination that the building is "infeasible to repair."

19. The City classified the Property as an SRO hotel although the Property contained units in which less than thirty percent (30%) of them did not include private bath and toilet facilities. The City also determined that the Property was feasible to repair.

20. The City, Does 1 through 50 and the Department advised petitioner/plaintiff that they conditioned his application for a demolition permit upon replacing the Property with a like number of low-income residential units.

21. Petitioner/plaintiff filed an appeal from the actions of the City, Does 1 through 50 and the Department, on or about March 13, 1990, and said appeal was deemed filed by the Department on or about April 30, 1990.

22. The Department affirmed its previous decisions regarding the Property and denied petitioner/plaintiff's appeal on all issues at the hearing on June 12, 1990.

23. Any further appeal therefrom was futile or not available as the City, Does 1 through 50 and the Department had indicated to petitioner/ plaintiff that any appeal would be denied.

24. On or about August 1, 1990, the City, through Barbara Zeidman, Director of the Rent Stabilization Division in the Community Development Department, determined that the Property was not an SRO hotel in that more than 70% of the rooms were equipped with bath facilities. The Property was thus exempted from Ordinance 165,145 and a demolition permit was issued.

25. The assessments for security services were approved at separate council actions and adopted by resolution of the Los Angeles City Council on or about August 17, 1990, September 5, 1990, and January 8, 1991, in the amounts of $61,107.20, $112,716.80 and $201,686.02, respectively.

26. The City's final assessment was not approved and adopted until January 8, 1991, and the final notices of assessment were not submitted to petitioner/plaintiff by the City until April, 1991, although the structure on the Property was demolished and removed on or about August 15, 1990, and security services were terminated on that date.

27. As a result of these assessments, petitioner/ plaintiff was forced to expend $375,509.02 plus costs and

interest, to pay the City liens and clear title to the Property. On or about May 29, 1992, petitioner/plaintiff filed with the City a claim for refund of these amounts.

28. As a result of respondents/defendants' failure to correct the zoning designation and grant the permit to demolish the Property, petitioner/ plaintiff was forced to pay property taxes during the period from January, 1989 to January, 1991.

29. As a result of respondents/defendants' failure to correct the wrongful zoning designation and grant the permit to demolish the Property, petitioner/plaintiff was prevented from selling the Property at the price contracted for in December, 1988, and suffered a decrease in the sale price in the amount of $400,000.00, and a loss in value in a greater sum according to proof.

30. Petitioner/plaintiff is personally obligated to pay his attorney for services in prosecuting this action. Petitioner/plaintiff is entitled to recover attorney's fees as provided in Government Code Section 800 if he prevails in the within action, on the ground that the Department's decision was the result of arbitrary and capricious action, as follows: the Department's decision, as adopted by the City, that the Property was an SRO hotel which was less than 50% destroyed (thereby prohibiting issuance of a demolition permit), was made to coerce petitioner/plaintiff into constructing low income housing.

31. On August 6, 1990, petitioner/plaintiff, through his counsel, requested that the Department of Building and Safety Commission and Department of Building and Safety Advisory Appeal Board prepare a true and correct copy of the administrative record. A true and correct

copy of the record will be lodged with the Court before the hearing date.

FIRST CAUSE OF ACTION

(Petition for Writ of Administrative Mandate Against the City and Does 1 through 50)

32. Petitioner/plaintiff realleges and here incorporates by this reference each and every allegation contained in paragraphs 1 – 31 of this Second Amended Complaint as though here fully set forth.

33. Under Section 91.8903(g)(2) of the Los Angeles Municipal Code, the Department has discretion to determine whether grounds exist for granting or denying an application for a demolition permit, and especially to determine whether a structure is classified an SRO hotel, and whether a structure is irreparable due to fire damage. Pursuant to Section 91.8903(g) (2) (c) of the Los Angeles Municipal Code, the Department is authorized and required to hold a hearing and take evidence in its proceedings for the determination of those facts.

34. Hearings were held on May 31, 1990, at 200 North Main Street, Room 1325, Los Angeles California, in front of the Advisory Appeals Board, and on June 12, 1990 at 200 North Spring, Room 252, Los Angeles California, in front of the Building and Safety Commission, to receive evidence on the issues under appeal, among which were whether the Property was an SRO hotel and whether it was damaged in excess of 50%. Petitioner/ plaintiff attended the hearings. On June 12, 1990, petitioner/ plaintiff received the Department's decision and order that the Property was an SRO hotel, and that the

percentage of destruction caused by fire was less than 50%. The City thereafter adopted that decision as its own.

35. The Department's decision and order are invalid under Code of Civil Procedure Section 1094.5 for the following reasons;

(1) The Department committed a prejudicial abuse of discretion in that the hearing officer of the Building and Safety Commission meeting #7352 found that the Property consisted of rooms of which less than 30% had their own bathroom facilities. The evidence received at the hearing does not support this finding, as petitioner/plaintiff alleges more particularly hereinafter; and

(2) The hearing officer of the Building and Safety Commission Meeting #7352 found that the Property was damaged by fire only to the extent of 35%. The evidence received at the hearing does not support this finding, as petitioner/plaintiff alleges more particularly hereinafter.

36. The substance of the evidence received at the Building and Safety Commission Meeting #7352 is as follows: Engineer's Preliminary Report dated December 8, 1988, setting forth that the cost to repair the Property was $1,500,000; County Assessors assessment, dated December 27, 1988 setting forth that the Property suffered a 90% loss for tax purposes; Sworn Statement and Proof of Loss from petitioner/plaintiff's insurer, dated January 1, 1989, declaring a 100% loss on the contents of the structure; 230 page room-by-room repair estimate completed on January 4, 1989, at the request of petitioner/plaintiff's insurer and prepared by Driver-Eddy Construction Company setting forth that the cost to repair the

structure was $1,375,850.37 and that the rooms with private baths represented more than 70% of the total rooms; Appraisal Report prepared by Appraisal Associates, dated November 11, 1988, setting forth that the value of the structure was $1.43 – $2 million; report of consulting structural engineers, Farhad/Tabibzadeh, setting forth a damage estimate of 80%; letter from proposed developer, Hafco & Associates, dated June, 1989, setting forth that the structure would have to be torn down due to massive damage; Report of Investigation prepared by Mackintosh & Mackintosh Consulting Engineers dated May 4, 1990, setting forth that the extent of fire damage is 72.4%; Appraisal Report dated September 30, 1988, prepared by Tracey Lee of CASA-SOL, setting forth that value of the structure was $1,317,500.00; list from Counter "D" of the Department of all SRO hotels in Los Angeles, setting forth that the Property was not included; and Rental Housing Project Income Analysis and Appraisal based on inspection, prepared on January 5, 1983, submitted for the M.O.R.E. loan program to the Rehabilitation Project Coordinator of the City of Los Angeles, setting forth that 63 of 77 rooms of the Property were equipped with separate bathroom facilities, that out of 77 rooms, 70 were equipped with bathrooms and only 14 rooms had shared bath facilities. The evidence does not support the findings for the following reasons: the Property is not an SRO hotel in that more than 70% of the rooms are equipped with separate bathrooms and the Property was more than 358 [sic] – destroyed at the time the application for a demolition permit was made.

37. The following evidence was not presented at the hearing: letter dated August 1, 1990, from the City of Los

Angeles Rent Stabilization Division, setting forth that the Property had more than 70% of the rooms equipped with bath facilities and is not an SRO hotel. This evidence was not presented in that the letter was received after the hearing. This evidence establishes that the City and Department wrongly classified the Property as an SRO hotel and failed to correct the designation despite the evidence previously available within the City's records and additionally presented, establishing that the Property is not an SKO [sic] hotel.

38. As a result of the Department's findings, the Department continued to refuse to grant petitioner/plaintiff's application for a demolition permit and petitioner/plaintiff continued to be liable for the cost of the City-ordered 24-hour security patrol for the Property.

39. Respondents/defendants abused their discretion by failing to correct the wrongful zoning designation placed on the Property, by failing to find that the Property had been damaged in excess of 50%, by refusing to grant petitioner/plaintiff's application for a demolition permit, by requiring petitioner/plaintiff to pay $375,509.02, plus costs and interest, for City-contracted security services and $5,290.05 for weed abatement and by failing to submit notice of final assessment against the Property until ten months after the building was demolished. In addition, the City improperly removed security guards and measures placed on the premises by petitioner/plaintiff and installed or put their own in place. All charges and expenses connected with the City-placed security were improperly charged to petitioner/plaintiff.

40. The City is a local agency. A fundamental vested right is involved in that the City, the Department, and Does 1 – 50 refused to grant petitioner/plaintiff a permit to demolish the structure on his Property in order that he could go out of the rental housing business and sell his Property. Also, the City's placement of security guards and measures on petitioner/ plaintiff's premises resulted in denial of fundamental vested rights to the control of the real property. Therefore, the scope of review is under the Independent Judgment Test.

41. Petitioner/plaintiff is a person beneficially interested in the issuance of a writ by virtue of the fact that he personally has expended $375,509.02, plus costs and interest, to pay the City assessments for security services, $5,290.05 for weed abatement, suffered a loss in value of the property and a decrease in sales price due to the delay in the sale of the Property caused by the Department's refusal to grant his application for a demolition permit , and has expended $21,260.34, plus penalties, in property taxes for the Property during the time he was prevented from completing the sale, as a result of the City's refusal to grant the demolition permit.

42. Petitioner/plaintiff performed all conditions precedent to the filing of the first amended complaint and petition for writ by exhausting all available administrative remedies required to be pursued by him as follows: petitioner/plaintiff filed an appeal of the Department's action on or about April 30, 1990, and was present at the hearings of that appeal with the Advisory Appeal Board on May 31, 1990, and Building and Safety Commission Meeting #7352 on June 12, 1990. Petitioner/plaintiff did not appeal the decision of the Department in that he was

informed by the City and the Department that any appeal, if available, of the decision would be denied.

43. Petitioner/plaintiff has no plain, speedy, and adequate remedy in the ordinary course of law, other than the relief sought in this petition in that respondents/defendants' prejudicial abuse of discretion can only be controlled by a proceeding in mandamus.

44. As a result of respondents/defendants' actions, petitioner/plaintiff has sustained damages as follows: $375,509.02, plus costs and interests, in security services and $5,290.05 for weed abatement assessed by the City; $21,260.34, plus penalties, in property taxes during the period from January, 1989 to January, 1991, wherein petitioner/plaintiff was prevented from selling the Property pursuant to the December, 1988, purchase and sale agreement; a $400,000.00 decrease in the sales price of the Property as the difference between the contract price in December, 1988, and the actual price in April, 1991; an increase in demolition costs from $35,000.00 to $70,000.00 due to the Department's delay in granting the permit; a decrease in the value of the Property due to the wrongful zoning designation and delay in issuing the demolition permit; and loss of use of the money petitioner/plaintiff was to gain on sale of the Property under the December, 1988, contract. Respondents/defendants are liable for these damages by reason of their refusal to correct the wrongful SRO hotel designation despite ample evidence presented establishing that the Property was not an SRO hotel and their refusal to find that the building was infeasible to repair despite ample evidence presented establishing that the building was 80% – 100% destroyed.

Petitioner/plaintiff is entitled to recover these damages under Code of Civil Procedure Section 1095.

SECOND CAUSE OF ACTION
(DEPRIVATION OF CIVIL RIGHTS AGAINST ALL RESPONDENTS/DEFENDANTS)

45. Petitioner/plaintiff realleges and here incorporates by this reference each and every allegation contained in paragraphs 1 through 44 of this Second Amended Complaint as though here fully set forth.

46. This cause of action arises under the Civil Rights Act of 1871 (42 USC Section 1983) as hereinafter more fully appears. This court has jurisdiction under 28 USC Section 1343.

47. At all times herein mentioned, petitioner/plaintiff was, and now is, a person within the jurisdiction of the United States, and was residing within the City of Los Angeles, Los Angeles County, California.

48. At all times herein mentioned, respondents/defendants, in doing all of the things hereinafter mentioned, acted under color of their authority as such, and under color of the statutes, regulations, customs, and usages of the State of California, the City of Los Angeles, and the aforementioned Department and respondents/defendants, and pursuant to the official policy of the City as created by the Los Angeles City Council, took action under color of their authority as such.

49. On or about August 17, 1989, respondents/defendants wrongfully and unlawfully entered the Property, displayed police badges and other governmental

identification cards, stated that they were on official government business, and proceeded to take over possession and control of the Property, remove all other persons from the Property, remove all incidental and temporary structures from the Property, remove all protective scaffolding from around the Property, place a privately-contracted security service on the Property, and thereafter placed liens and encumbrances on the Property.

50. Petitioner/plaintiff in no way consented to respondents/defendants entry or subsequent conduct, but protested the same until his protests were overcome by these respondents/defendants' threats and shows of force.

51. By reason of respondents/defendants' entry onto the property and their conduct thereon, petitioner/plaintiff was deprived of rights, privileges, and immunities secured to him by the Constitution of the United States and laws enacted thereunder in that the seizures amounted to an arbitrary intrusion by these respondents/defendants into the security of petitioner/plaintiff's privacy, person, and property and were not authorized by law, and in that the action of these respondents/defendants deprived petitioner/plaintiff of life, liberty, and property without due process of law.

52. As a result of the deprivations of his rights, petitioner/plaintiff was injured, subjected to humiliation and indignity, and prevented from transacting his business, and suffered great physical, emotional and mental pain and suffering all to his damage in a sum in excess of the minimum jurisdictional limit of the Court in an exact amount to be proven at trial.

53. As a further result of the acts of these respondents/defendants, petitioner/plaintiff's Property was damaged in a sum in excess of the minimum jurisdictional limit of the Court in an exact amount to be proven at trial.

54. At all material times and in doing the things alleged, respondents/ defendants' conduct was intended to cause injury to petitioner/plaintiff herein, respondents/defendants acted fraudulently, oppressively, maliciously, and/or in conscious disregard of petitioner/ plaintiff's rights, and with the intention of wrongfully interfering with petitioner/plaintiff's rights, prospective economic position, and property interests. Therefore, petitioner/plaintiff is entitled to punitive and exemplary damages in a sum in an exact amount to be determined at trial.

THIRD CAUSE OF ACTION

(Interference With Contract Against All Respondents/Defendants)

55. Petitioner/plaintiff realleges and here incorporates by thisreference [sic] each and every allegation contained in paragraphs 1 through 54, of this Second Amended Complaint as though here fully set forth.

56. On or about December 16, 1988, petitioner/ plaintiff entered into a written agreement with Faradj-Ollah Harouni, wherein said party would purchase the Property from petitioner/plaintiff upon the condition that petitioner/plaintiff demolish the remaining structure on the Property and convey the Property free of any liens.

57. Respondents/defendants, and each of them, were given notice on numerous occasions by the petitioner/plaintiff, his agents and the buyers of the Property under said contract, and intentionally interfered with said contract by refusing to grant petitioner/plaintiff a permit to demolish the structure on the Property.

58. The City failed to render its final assessment on the Property for security services until January 8, 1991, and failed to submit final Notice thereof until April, 1991, although it was on notice that the buyer under the contract was prevented from completing the purchase unless and until the city approved the final assessment against the Property.

59. As a direct, actual and proximate result of the actions of the respondents/defendants, and each of them, petitioner/plaintiff has sustained injuries and damages, including but not limited to, being unable to comply with the terms of said written contract, the full extent of which will be proven at the time of trial.

60. At all material times and in doing the things alleged, respondents/defendants acted in an arbitrary, capricious and illegal manner by wrongfully classifying the Property as an SRO hotel and in refusing to grant the demolition permit. Respondents/defendants' conduct was intended to cause injury to petitioner/plaintiff herein, in acting fraudulently, oppressively, maliciously, and/or in conscious disregard of petitioner/plaintiff's rights, and with the intention of wrongfully interfering with petitioner/plaintiff's rights, prospective economic position, and property interests. Therefore, petitioner/

plaintiff is entitled to punitive and exemplary damages in an amount to be proved at trial.

FOURTH CAUSE OF ACTION

(Trespass Against Action Guard, Intercon and Does 51 – 100)

61. Petitioner/plaintiff realleges and here incorporates by this reference each and every allegation contained in paragraphs 1 through 60, of this Second Amended Complaint as though here fully set forth.

62. On or about August 17, 1989, and continuing to August 15, 1990, respondents/defendants Action Guard, Intercon, and Does 51 – 100 and each of them, without petitioner/plaintiff's consent, entered the Property, took possession and control of the Property, and deprived petitioner/plaintiff of possession and control of the property.

63. As a proximate result of the trespassory conduct of these respondents/defendants as descibed [sic] above and in the proceeding paragraph, petitioner/plaintiff's property has been damaged in a sum in excess of the minium [sic] jurisdictional limit of the court, in an exact amount to be proven at trial.

64. As a further result of the trespassory conduct of these respondents/ defendants as described above and in paragraph 62, petitioner/plaintiff has suffered great humiliation and indignity, has been prevented from transacting his business, and suffered great physical,

emotional and mental pain and suffering all to his damage in a sum in excess of the minium [sic] jurisdictional limit of the court, in an exact amount to be proven at trial.

65. At all material times and in doing the things alleged, these respondents/defendants' conduct was intended to cause injury to petitioner/plaintiff herein, in acting fraudulently, oppressively, maliciously, and/or in conscious disregard of petitioner/plaintiff's rights, and with the intention of wrongfully interfering with petitioner/plaintiff's rights, prospective economic position, and property interests. Therefore, petitioner/plaintiff is entitled to punitive and exemplary damages in a sum to be proved at trial.

FIFTH CAUSE OF ACTION

(Negligence against all defendants)

66. Petitioner/Plaintiff realleges and here incorporates by this reference, each and every allegation contained in paragraphs 1 through 53 and 55 through 59 and 61 through 64 of this Second Amended Complaint, as though here fully set forth.

67. During all or some portion the time period from approximately November 1988, through April, 1991, Defendants/Respondents, and each of them, negligently and carelessly reviewed Petitioner/Plaintiff's applications for demolition permits, and entered onto real property owned by Petitioner/Plaintiff, controlled, maintained and purportedly protected said real property in a negligent and careless manner.

68. As a proximate result of the negligence of Defendants/Respondents and each of them, petitioner/plaintiff has been injured, subjected to loss of personal property, loss of value of real property and other real property, losses and expenses, indignity, and humiliation, deprived of his property and rights, prevented from transacting his business, and has suffered great economic, physical, emotional, and mental pain and suffering, and in addition there was physical damage to the property and loss of personal property from the property, all to his damage in a sum in excess of the minium [sic] jurisdictional limit of the Court in an exact amount to be proven at trial.

SIXTH CAUSE OF ACTION

(Inverse Condemnation Against all Defendants)

69. Petitioner/plaintiff realleges and here incorporates by this reference, each and every allegation contained in paragraphs 1 through 68 of this Second Amended Complaint as though here fully set forth.

70. From approximately November, 1988, through April, 1991, petitioner/plaintiff was the owner in fee of the Property commonly known as 2065 West Sixth Street, City of Los Angeles, County of Los Angeles, State of California and more particularly described as follows:

> Lots 35, 36 and 37 of the extension of Nob Hill Tract, as per map recorded in Book 42, page 56 of Miscellaneous Records of Los Angeles County.

71. From approximately November, 1988, through April, 1991, Respondents/Defendants allowed damage to

the Property and prevented petitioner/plaintiff from entering upon, using, controlling, maintaining, and exercising ownership rights over the Property in that, *inter alia*, petitioner/ plaintiff was denied a demolition permit without valid grounds for the denial, denied access to his Property and denied control over the Property, which constituted a taking of the property.

72. As a direct and proximate result of the actions by Respondents/ Defendants, Petitioner/Plaintiff was damaged at least as follows:

$375,509.02, plus costs and interests, in security services and $5,290.05 for weed abatement assessed by the City; $21,260.34, plus penalties, in property taxes during the period from January, 1989 to January, 1991, wherein petitioner/plaintiff was prevented from selling the Property pursuant to the December, 1988, purchase and sale agreement; a $400,000.00 decrease in the sales price of the Property as the difference between the contract price in December, 1988 and the actual price in April, 1991; an increase in demolition costs from $35,000.00 to $70,000.00 due to the Department's delay in granting the permit; a decrease in the value of the Property due to the wrongful zoning designation and delay in issuing the demolition permit; and loss of use of the money petitioner/plaintiff was to gain on sale of the Property under the December, 1988, contract, and there was physical damage to the property and loss of personal property, all to the damage of Petitioner/Plaintiff in a total amount to be proven at trial.

73. Petitioner/Plaintiff has received no compensation for the damage to his property or for the taking.

74. Petitioner/Plaintiff has incurred and will incur attorney's, appraisal and engineering fees because of this proceeding, in amounts that cannot yet be ascertained, which are recoverable in this action under the provisions of Section 1036 of the California Code of Civil Procedure.

WHEREFORE, petitioner/plaintiff prays that:

On the First Cause of Action

1. A peremptory writ of mandate issue, pursuant to Code of Civil Procedure, Section 1094.5, directed to respondent/defendant City and compelling respondent/defendant City to rescind the assessments against petitioner/plaintiff on the amount in excess of $375,509.02 for security services, plus costs and interests in the total amount of $399,060.56, and $5,290.05 for weed abatement and return to petitioner/plaintiff the full amount paid to the City plus interest thereon; to pay damages of $21,260.34, plus penalties, to petitioner/plaintiff representing Property taxes petitioner/plaintiff was wrongfully required to pay during the time the City's actions prevented him from selling the property pursuant to the purchase and sale contract described above; to pay damages of $400,000.00 representing a decrease in sales price of the Property as a result of the delay and litigation caused by the City's refusal to allow demolition of the Property; to pay damages for loss in value of the Property caused by the City's conduct in an amount to be proven at trial; to pay damages in the amount of $35,000.00 for increased demolition costs; to pay petitioner/ plaintiff damages for loss of use of the money to be gained on sale of the Property pursuant to the December, 1988 contract for sale;

2. Respondent/defendant City be required to pay petitioner/plaintiff his attorney's fees pursuant to Section 800 of the Government Code;

On the Second Cause of Action

3. Respondents/defendants be required to pay to petitioner/plaintiff damages in a sum in excess of the minium [sic] jurisdictional limit of the Court, in an exact amount to be proven at trial;

4. Respondents/defendants be required to pay to petitioner/plaintiff exemplary and punitive damages to deter respondents/defendants from future similar conduct and punish them for their conduct herein in an amount to be proved at trial.

5. Respondent/defendant City be required to pay petitioner/plaintiff attorney's fees pursuant to Section 1988 of Title 42 of the United States Code;

On the Third Cause of Action

6. Respondents/defendants be required to pay to petitioner/plaintiff damages in a sum in excess of the minium [sic] jurisdictional limit of the Court, in an exact amount to be proven at trial;

7. Respondents/defendants be required to pay to petitioner/plaintiff exemplary and punitive damages to deter these respondents/defendants from future similar conduct and punish them for their conduct herein in an amount to be proved at trial.

On the Fourth Cause of Action

8. Respondents/defendants be required to pay to petitioner/plaintiff damages in a sum in excess of the

minium [sic] jurisdictional limit of the Court, in an exact amount to be proven at trial;

9. Respondents/defendants, Action Guard, Intercon and Does 51 through 100 be required to pay to petitioner/plaintiff exemplary and punitive damages to deter these respondents/defendants from future similar conduct and punish them for their conduct herein in an amount to be proven at trial.

On the Fifth Cause of Action

10. General damages in a sum to be proved at trial;

11. Damage to personal property in a sum to be proved at trial;

On the Sixth Cause of Action

12. Damages in a sum to be proved at trial, together with interest at the legal rate from the date of the damages;

13. Reasonable attorney's, appraisal and engineering fees according to proof;

On All Causes of Action

14. Respondents/defendants be required to pay petitioner/plaintiff's attorney fees pursuant to Code of Civil Procedure Section 1021.5;

15. Respondents/defendants be required to pay petitioner/plaintiff's costs of suit herein incurred; and

16. For such other and further relief as the court may deem just and proper.

DATED: OCTOBER 4, 1995 LAW OFFICES OF ROSARIO PERRY

BY: /s/ Rosario Perry
Rosario Perry
Attorneys for
Petitioner/Plaintiff
SYED MOUZZAM ALI

Supreme Court, U.S.
FILED
JUL 27 2000
CLERK

(2)

No. 99-2084

IN THE

Supreme Court of the United States

THE CITY OF LOS ANGELES,

Petitioner,

v.

SYED MOUZZAM ALI,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEALS

BRIEF IN OPPOSITION

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REASONS FOR DENYING THE WRIT

I.

THE CALIFORNIA COURT OF APPEAL DECISION IN *ALI v. CITY OF LOS ANGELES* IS BASED ON THE SPECIFIC FACTS OF THE CASE APPLYING CALIFORNIA LAW.

The decision and opinion in *Ali v. City of Los Angeles* do not conflict with established federal takings law, which supports damages for temporary takings arising from certain misapplications of local regulations (*i.e. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987)). Federal law was never a primary concern in the *Ali* Inverse Condemnation cause as it wove through the California courts. The major consideration in the California Ali appeal was the City's total disregard of the state Ellis Act.

Ali is a temporary takings case based primarily on state law. The Court found a temporary taking due to delay in processing a demolition permit because the City's position "was so unreasonable from a legal standpoint as to be arbitrary, not in furtherance of any legitimate governmental objective, and for no other purpose than to delay any development other than for an SRO hotel" (Petitioner's Appendix 13).

The reason underlying appellate affirmance of the decision that the City of Los Angeles' delay was unreasonable, implausible, and unexcused is that the City employed as an excuse for not immediately issuing a

demolition permit a local ordinance that never applied to Mr. Ali's property in the first place. The delay also operated as leverage to obtain low-income housing on a lot perceived by the City as appropriate for such housing. The application of the local ordinance when Ali applied for a demolition permit under the circumstances presented violated state law, the Ellis Act (California Government Code § 7060 *et al.*).

The Ellis Act, passed in March 1986 (3 years prior to Ali's application for a demolition permit), was not at all uncertain or unsettled in January 1989; it had already been interpreted by two published Second District Court of Appeal decisions (both published in September 1998 — some six months prior to Ali's application). Those two cases, *Javidzad v. City of Santa Monica*, 204 Cal.App.3d 524, 251 Cal.Rptr. 350 (1988); and *City of Santa Monica v. Yarmark*, 203 Cal.App.3d 153, 249 Cal.Rptr. 732 (1988), both held that the Ellis Act preempted city ordinances which prohibited demolition of residential rental buildings.

Thus under the Ellis Act, cities are required to allow owners to demolish their buildings and go out of the rental business. These decisions are so clear and unambiguous on this point, that the City clearly was unreasonable in ignoring Ellis and stonewalling the issuance of the demolition permit.

The California courts have agreed that in the *Ali* case the City of Los Angeles continued to violate the Ellis Act long after it knew or should have known of its violation. The City's conduct, as of January 1989, was plainly arbitrary in ignoring the law applicable to the Ali demolition request. Furthermore, as the trial court found, not only did the City ignore the Ellis law, but also ignored Ali's repeated notices

to the City and the City Attorney's office about the existence of the Ellis Act, *Javidzad* and *Yarmark*, and Ali's claims under the Act.

Thus it is immediately clear that the decision in *Ali v. City of Los Angeles* is based on California statutes, Los Angeles City ordinances, and interpretations by California courts of California law, with an acknowledgment of *First English*. Since state law predominates in this case, the state courts are best equipped to determine its issues. The state courts already have done so, and the well-considered and thoughtful opinion herein should stand.

II.

PETITIONER DID NOT ADEQUATELY PRESENT FEDERAL ISSUES IN THE CALIFORNIA APPEAL, AND THIS COURT THEREFORE DOES NOT HAVE JURISDICTION PURSUANT TO 28 U.S.C. § 1257.

28 U.S.C. § 1257(a) sets out the jurisdiction of this Court as to state court judgments and requires either that the validity of a treaty or statute be challenged as contrary to federal law or that a federal title, right, privilege or immunity is specially set up or claimed. In addition, the issues for which certiorari is asked must have been rendered by the highest court in the state. The instant petition does not demonstrate any of these requirements.

Where the state court was silent regarding the issues for which certiorari is sought before the United States Supreme Court, it is assumed that the federal question was not properly presented in the state courts and certiorari is generally denied (*Adams v. Robertson*, 520 U.S. 83, 86-7, 137 L. Ed. 2d 203,

117 S. Ct. 1028 (1997); *Street v. State of New York*, 394 U.S. 576, 581, 22 L. Ed. 2d 572, 89 S. Ct. 1354 (1969)). If it is not evident from the state court decision that the federal issue was raised in that Court, the United States Supreme Court usually attributes the decision to state law (*United States ex rel. Pascal v. Burke*, 90 F. Supp. 868, 871 (1950)). Further, the federal question presented must be a substantial one (*Reich v. City of Freeport*, 388 F. Supp. 953, 955 (1974), *aff.*, 527 F.2d 666 (1975)).

As shown by the opinion at Petitioner's Appendix 1-16, the California Court of Appeal did not decide a federal question, but primarily relied on California's Ellis Act and state court decisions interpreting it to affirm Judgment for Respondent Ali. The opinion's failure to cite federal law as a specific basis for its decision forces the conclusion that the case was indeed decided under state law and renders this Court without jurisdiction to grant certiorari. Any background discussion of federal law in the opinion does not constitute the "substantial" federal question necessary for Supreme Court review.

In its Petition for Review before the California Supreme Court, Petitioner City of Los Angeles articulated two issues regarding exhaustion of administrative remedies under local law and a third regarding ultra vires activity by local agencies (Petitioner's App. 56-7). Although issues such as these rely on United States Constitutional law in a very general way, they specifically were framed before the California Supreme Court to question whether Ali's activities exhausted California and local administrative remedies and whether the City had due authority under the requirements of the Municipal Code. Respondent submits that these issues do not sufficiently concern federal law to constitute federal questions.

In seeking rehearing before the California Court of Appeal, Petitioner based its Petition on grounds of factual conflict with the findings and a claim that the facts did not support the decision (Petitioner's App. 80). Thus the City's basis for seeking rehearing had nothing to do with federal law.

The City's appeal itself was also fact-based, as shown by the excerpts provided at Petitioner's Appendix 112-123, which discuss the basis for the City's well-refuted claim that as to Mr. Ali's property, and based on those specific facts, there was neither a regulatory taking nor a physical taking despite the findings and Judgment below.

The salient federal question throughout the *Ali* case was not raised by the City, but by Mr. Ali. Mr. Ali's second cause of action was a claim that his civil rights were violated, and in particular his due process rights, but the cause was decided against Mr. Ali in the trial court.

The Court of Appeal declined to decide the civil rights issue, which *Ali* had cross-appealed, declaring it moot because a reversal of the cause would not bring any different or additional damages to Mr. Ali. The City did not attempt to seek review of the determination of either court as to the civil rights cause of action.

It would seem that another party's federal claim on a different subject would not change the fact that the City of Los Angeles did not pose a real federal question on appeal in California, thus making it impossible for Petitioner to comply with United States Supreme Court Rule 14(1)(g)(i).

III.

PETITIONER MISTAKENLY REFERS TO THE "DEVELOPMENT" PROCESS; THIS CASE IS ABOUT A DEMOLITION PERMIT.

Petitioner's first issue poses a query about "a land use development approval process" (Petition: Frontispiece). Petitioner's first argument concerns delay in the "Development Approval Process" (Petition: 13). Scattered throughout the Brief are references to "development" permits (i.e. Petition: 15, 16, 18). The case has nothing to do with development permits.

The *Ali* case presents facts almost the antithesis of the usual fact pattern in development permit cases. The real property in *Ali*, far from being raw land, was located in one of the oldest parts of the sprawling City of Los Angeles: the MacArthur Park area. There was no environmental or other community challenge.

Mr. Ali's residential hotel was rendered dangerously damaged and structurally unsound after a fire effectively destroyed it in November, 1988. The City of Los Angeles, however, refused to issue a demolition permit until approximately 21 months later, and, in fact, for about a year of that time physically ousted owner Ali and his private security guards and placed City-hired guards on the property to the tune of just under $400,000 in liens, which Mr. Ali had to pay when he finally was able to sell the property after demolition in August 1990. The California courts have found that the City's actions amounted to both a regulatory and a physical temporary taking of Mr. Ali's real property.

The mis-characterization of the subject of the litigation as a "development process" makes a difference. Mr. Ali was not trying to build anything or to make any changes in the zoning of the land or in its use as combined residential and commercial (Mr. Ali's hotel, as does the subsequent strip mall, featured shops on the first floor). Ali was only attempting to demolish his burnt-out building so he could sell the vacant land.

In the typical development permit case, undeveloped, often scenic or historical real property happens to be located in the path of urban growth and is coveted for new housing or other building by some group while another group opposes any change in the use of the land. The considerations as to which factors would make it reasonable to withhold a development permit are not the same as the considerations as to whether a permit should issue to remove a dangerous, worthless hulk which threatens the public safety and welfare in an area that has been city neighborhood for a century.

At the time Ali submitted his first application, January 1989, the statutory and case law was clear and unambiguous on this subject. Ali had a right to demolish his building under the state Ellis Act which preempted local laws to the contrary. The City, without any legally plausible reason, prohibited him from demolishing his building. The City should not now confuse Ali's clear entitlement to demolition with a developer's campaign to change the character of the land.

The City's long refusal to permit demolition purportedly was based on Mr. Ali's refusal to promise to replace his fire-damaged building with low-income housing pursuant to the city's SRO Ordinance, which never applied to the property

in the first place, as shown by the City's own records. To this day, the City has not offered any "plausible" legal theory justifying its position in denying Ali his demolition.

IV.

THE PRIOR LAWSUIT BETWEEN THE PARTIES IS NOT RELEVANT.

In support of its Petition for Certiorari, the City of Los Angeles, by inclusion, asserts that a prior Los Angeles Superior Court lawsuit between the parties, which was dismissed without prejudice in September 1989, and not even part of the Record on Appeal in California, somehow has bearing on whether the United States Supreme Court hears the case (Petition: 5-7). A copy of the Order of Dismissal is located in Petitioner's Appendix at 48-49.

In its Exhibit K to Petitioner's Appendix, the City's Petition for Rehearing by the California Court of Appeal, the City, as it did below, also attaches copies of the Complaint and a Demurrer from that 1989 non-appealed and long-final lawsuit. The documents were not otherwise part of the record on appeal and were improperly asserted in a California appeal (*Pulver v. Avco Financial Services*, 182 Cal.App.3d 622, 632, 227 Cal.Rptr. 491 (1986); *Sequoia Pine Mills, Inc. v. Superior Court*, 258 Cal.App.2d 65, 69, 65 Cal.Rptr. 353 (1968); *Weller v. Shavarria*, 233 Cal.App.2d 234, 246, 43 Cal.Rptr. 364 (1965)).

This prior lawsuit, which the City calls "Ali I," resulted in an order by the Honorable John Zebrowski sustaining the City's demurrer based on the failure to exhaust administrative remedies before filing suit (Petitioner's Appendix 48-49).

The Order, signed March 20, 1990, is specifically without prejudice to Ali filing a new lawsuit and states in part:

> This Order is not intended to preclude Ali from filing a complaint in a subsequent lawsuit.

The recent appellate decision for which Certiorari is sought arises out of the second lawsuit filed against the City by Mr. Ali that was suggested by Judge Zebrowski, and is not dependent in any way upon the action dismissed nearly half a year before the second lawsuit was commenced in August 1990. The only relevance of that 1989 lawsuit to the case now before this Court was to prove that Mr. Ali raised the Ellis Act against the City early in his negotiations with the City, and neither misled the City nor sat on his rights.

At page 7 of the Petition for Certiorari, the City of Los Angeles states that "[t]he trial judge . . . ruled that Ali was required to continue with the development approval process and obtain a final decision on his permit application." The statement is untrue. As shown by the copy of the ruling at Petitioners' Appendix 48-49, the Judge made no such ruling. In addition, Judge Zebrowski, a well-respected jurist in the Los Angeles area who shortly thereafter moved on to the Court of Appeal, would not have made the mistake of referring to the demolition permit sought by Mr. Ali as part of the "development approval process."

V.

ALI DID NOT CHALLENGE THE VALIDITY OF THE CITY'S SRO ORDINANCE; ALI ALLEGED AND PROVED THAT THE APPLICATION OF ANY LOCAL LAW THAT CONFLICTED WITH THE ELLIS ACT WOULD VIOLATE HIS RIGHTS.

At page 14 of its Brief, Petitioner mischaracterizes the gravamen of the instant lawsuit. Mr. Ali did not argue at trial or on appeal against the SRO ordinance itself, its validity, or its constitutionality. Ali claimed from the beginning of his problems that it was the City's application of the non-applicable SRO ordinance in a manner that interfered with his ability to demolish his shell of a building and go out of the residential rental business that violated the Ellis Act. Any other local provision that hindered or interfered with Mr. Ali's decision to go out of business would be as much a violation of Mr. Ali's Ellis rights.

Had the SRO ordinance actually been applicable to the Ali property, the result would have been the same. The ordinance still would have been preempted by the Ellis Act as to that property and Mr. Ali's rights still would have been violated by its application. The fact that the Ali property never fit the definition of an SRO building, however, makes the City's actions in trying to subject Mr. Ali to the SRO ordinance all the more egregious.

Thus the City's discussion on page 14 to the effect that Mr. Ali's failure to follow the SRO procedures mandated by the City were the origin of his difficulties is not accurate. In fact, Mr. Ali tried to follow the obscure procedures developed in connection with the SRO designation, to no avail.

The City fails to mention that among its other ploys, it specifically and wrongfully classified as "repairable" a totally burned-out building on which an insurance company paid policy limits. The mis-classification avoided any possibility that Mr. Ali could obtain a demolition permit due to the moratorium of such permits mandated by the SRO ordinance, in a local version of "Catch-22." The wrongful label "SRO" delayed the demolition for 21 months.

VI.

THE ISSUES ARTICULATED BY THE CITY DO NOT REFLECT THE FACTS OF THE CASE.

Both questions stated by Petitioner as needing further review are misleading in that they do not accurately reflect the facts of the case. The first implies that Mr. Ali failed to exhaust administrative remedies in seeking "development approval," or that the "development approval process" violates federal law, and the other suggests that the Court of Appeal decision is based on violation of state law by a local ordinance. Both are factually incorrect.

A review of the unpublished 1995 Court of Appeal decision shows that the exhaustion issue was decided in the first appeal (Petitioner's App. 42). The determination that Ali sufficiently exhausted administrative remedies is subject to the Law of the Case Doctrine, and cannot again be challenged by the City of Los Angeles.

There was no "development approval process" in *Ali*, but applications for a demolition permit. Ali did not attack the validity of any administrative process, except as it specifically had been applied to him by the City in

circumstances where he had separate entitlements as a result of the Ellis Act. Likewise, Ali did not attack the validity of any local ordinance, but only the wrongful application of an ordinance to his property.

In addition, the state-law violation by the City did not occur in a vacuum. Mr. Ali was out of pocket over $1,000.000 due to the City's actions. The injury to Mr. Ali was so certain that at trial the City stipulated to the amount of damages in almost the full amount asked for.

It also is the Law of the Case herein that the City had no right to deny Mr. Ali's demolition permit, pursuant to his rights under the Ellis Act (Government Code § 7060 *et al.*; Petitioner's App. 35-47). The City cannot turn back the clock five years to appeal a factual finding that has been final throughout the interim.

VII.

THE SRO CLASSIFICATION WAS NEVER BASED ON SUBSTANCE.

"SRO" stands for "Single-room occupancy" and has different meanings under different regulatory schemes. In the City of Los Angeles, "SRO" essentially means that at least 30% of the rooms have no separate bathroom facilities. Mr. Ali's Ferraro Hotel had a private bathroom for nearly every room and, at least after Mr. Ali's early 1980s remodel, was never an "SRO."

Petitioner's Brief assumes that the SRO designation was properly handled (Petition: 13-14). Petitioner even sets out how the classification was made by employee Paul Wong. The City fails to mention, however, that the *Ali* SRO

designation was the only one ever made by Paul Wong, as he testified at trial. The truth is that the City of Los Angeles had no particular procedure for classification of buildings as SROs.

Many of Mr. Ali's own records were lost in the fire that destroyed the Ferraro, but the City of Los Angeles had all necessary paperwork in its files at all times. When the City eventually determined that Mr. Ali's building was not an SRO, the change of heart was based on a reconstructed file obtained from the City's own records. The City, and only the City, was in a position to clear up any matter regarding the property at any and all times during the last twelve years. The City, however, placed the entire burden of proof on Mr. Ali to show that his building was *not an SRO*!

The transcripts of the final administrative hearing reveal the City's stated basis for the SRO designation on the Ali property: (1) Paul Wong had a conversation with an unidentified man who he believed to be Mr. Ali (but who was not Mr. Ali) and based on that conversation, affixed the label "SRO;" Mr. Wong had been in contact with Councilwoman Gloria Molina's office and made the classification only after consultation; (2) the Rent Stabilization Board, which administered the SRO ordinance, supposedly placed the Ali building on its SRO list, but the City never was able to produce any SRO list which included the Ferraro; (3) an inspection team, nearly a year after the fire and after the building had been ravaged by vandals, stood in the outside doorway of the burned-out hotel and estimated the number of bathrooms in the several-story structure; and (4) Councilwoman Gloria Molina said it was an SRO in a special ordinance she proposed and which was adopted on August 8, 1989 (Joint Appendix on Appeal: II: 472-3, III: 707-8, 731-2, IV: 904-8, 1073, 1086, 1092-5).

The only investigation of its files made on behalf of the City of Los Angeles was more than a year later, after Rent Stabilization Administrator Barbara Zeidman attended one of the Ali administrative hearings and was convinced by Mr. Ali's reconstructed paperwork to check into the facts for the first time (Joint Appendix III: 713-7). It was the first time that any City official listened to Mr. Ali's frequent protests that the building was not an SRO.

VIII.

JUDGE CRISPO'S OBSERVATIONS ON SUBSTANTIVE DUE PROCESS DO NOT APPLY TO INVERSE CONDEMNATION.

At Page 10 of the Petition, the City quotes the Honorable Lawrence W. Crispo, the trial judge, but the context in which the statement was made is not shown. The quote does not apply to the inverse condemnation cause of action.

The trial of this case after the first Appeal was in several parts. The writ cause was heard first by Judge O'Brien and the other causes were heard by Judge Crispo in two phases: Inverse Condemnation (in which Ali prevailed) and Substantive Due Process (Judgment for the City). This trial resulted in three statements of decision which combine to form the findings upon which the Judgment stands.

The portion of Judge Crispo's findings that the City quotes relates to Ali's cause of action under 42 U.S.C. § 1983 for violation of civil rights, specifically Substantive Due Process rights. In the complete version of the chronologically third portion of the findings (Petitioner's App. 22-26), the language quoted by the City is followed

directly in the same paragraph by, "Consequently there was no violation of Mr. Ali's substantive due process rights" (Petitioner's App. 25).

The test for establishing a section 1983 violation is set out by Judge Crispo in the paragraph immediately above the quoted language, and further qualifies the quote. The quote is entirely misrepresented in the Petition (Page 10) as general "findings about the character of the City's actions," when all it really does is show why Judge Crispo felt that the actions of the specific city officials did not "shock the conscience" as is required in California to prevail in § 1983 lawsuits based on substantive due process.

The Section 1983 cause of action was tried after the Inverse Condemnation cause, resulting in a statement of decision on May 1, 1997 (J.A. XIV:3896). Nearly a month before, on April 9, 1997, Judge Crispo's first statement of decision was entered (Petitioner's App. 27-32). In a very different tone than that cited by Appellant City, the Judge stated:

> The Court independently finds, as was found by the Court of Appeal, that the delay in the issuance of the demolition permit was not caused by Ali's conduct and that the City was responsible for all of the delay. The Court also finds that Ali acted properly in his attempts to obtain the demolition permit.

Judge Crispo thus had different things to say about different causes of action. The findings as to Substantive Due Process do not apply to Inverse Condemnation any more than the Inverse Condemnation findings apply to Ali's Civil Rights cause.

The City therefore errs in its argument that Judge Crispo's finding of good faith on the part of city officials sufficient to defeat Ali's claim of civil rights violation also operates to affect his inverse condemnation claims. The several courts which have found the City's purposes illegal have made the objective analysis required for a finding of inverse condemnation.

CONCLUSION

For all the reasons set out above, Respondent Ali asks that this Court deny the City of Los Angeles' Petition for Certiorari.

Respectfully submitted,

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No. 99-2084

In The

Supreme Court of the United States

THE CITY OF LOS ANGELES,

Petitioner,

v.

SYED MOUZZAM ALI,

Respondent.

On Petition For A Writ Of Certiorari To The California Court Of Appeal

REPLY TO BRIEF IN OPPOSITION

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I

THE RECORD IN THIS CASE SHOWS THAT THE PRESENT FEDERAL ISSUES WERE DECIDED BY THE CALIFORNIA COURTS

Despite Respondent's argument to the contrary, jurisdiction is conferred upon the United States Supreme Court to review the federal questions presented in the within Petition for Writ of Certiorari pursuant to 28 U.S.C.A. § 1257(a).

In the present case, it is eminently clear that the California Court of Appeal decided a federal question in determining that there had been a temporary regulatory taking for which just compensation must be paid.

Citing decisions of this court, the trial judge, California Superior Court Judge Crispo, found that there had been a regulatory taking for which just compensation must be paid. He ruled as follows:

> "A taking of property occurs when a government regulation eliminates the economic viability of property to its owner. *Lucas v. South Carolina Coastal Council* (1992), 505 U.S. 1003. . . . When a taking occurs, the government must pay just compensation to the property owner. U.S. Const., Amend V. Just compensation is required even if the taking is a temporary one. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles* (1987) 482 U.S. 304." (App. 30)

The California Superior Court Judge Crispo further explained the basis of his finding of a regulatory taking by writing:

> "**Regulatory taking:** The denial of Ali's application for a demolition permit pursuant to the City's Rent Stabilization Ordinance ("RSO") constituted a regulatory taking. A regulatory taking occurs when an ordinance 'does not substantially advance legitimate state interests or

> denies an owner economically viable use of his land.' *Agins v. City of Tiburon* (1980) 447 U.S. 255, 260.
>
> The City's initial designation of the Ferraro as an SRO was erroneous. The SRO ordinance prevented the immediate demolition of the Ferraro." (App. 31)

The City appealed this decision to the California Court of Appeal. (App. 119-123). The Court of Appeal rejected the City's arguments. The California Court of Appeal made it clear that its decision would be based on its understanding of this Court's decisions by stating:

> "In *First Lutheran Church v. Los Angeles County* (1987) 482 U.S. 304, (hereafter *First English*) the Supreme Court indicated that a governmental regulation which deprives a landowner of all economically viable use of the land may constitute a regulatory taking of property which requires just compensation under federal constitutional law. (*Id.* at pp. 312-313.) This is consistent with the United States Supreme Court's pronouncements both before and after First English. (See *Agins v. City of Tiburon* (1980) 447 U.S. 255, 260, (citation) . . . " (App. 6)

The California Court of Appeal then explained its understanding of First English by stating as follows:

> The court in *First English* indicated two circumstances in which such a temporary denial of all use of the property would not require compensation: (1) the denial of use was required for public safety reasons (*citation*), or (2) the temporary deprivation was merely a normal delay in the permissible regulation of development. (citation.)" (App. 6-7)

After discussing this precedent and cases applying it, the California Court of Appeal held that:

> "[T]he delay in demolition caused by the erroneous enforcement of the SRO ordinance despite

> the prohibitions of the Ellis Act was not a "normal" delay in the development process. Because the delay temporarily deprived Ali of all use of his property and was not a normal delay in the development process, it was a temporary regulatory taking which required compensation under First English. Judge Crispo correctly awarded a judgment in favor of Ali in inverse condemnation." (App. 14)

A petition for review was filed with the California Supreme Court. App. J. The City's Petition for Review to the California Supreme Court explicitly tendered the following questions:

> "Is a landowner entitled to damages for a regulatory taking based on a non-final decision reversed by the government agency through its own development approval process?
>
> May a landowner pursue damages for a regulatory taking without first succeeding in setting aside the government agency's decision through a judicial determination in a mandamus proceeding?
>
> Can an action of a government agency that exceeds its statutory authority be a compensable taking?" (App. 56-57)

The order of the California Supreme Court denying the Petition for Review was entered on March 29, 2000. (App. F)

Although worded differently the questions now before the Court raised the same federal issue, i.e., has there been a temporary regulatory taking for which just compensation must be paid?

II

JUDGE CRISPO'S FINDINGS OF FACT ARE RELEVANT TO RESPONDENT'S REGULATORY TAKINGS THEORY

It is undisputed by the parties that there was a delay in the issuance of a demolition permit between January 1989 and August 1990. The development approval process in this case centered around a dispute over the correct classification of the Ferraro Hotel. Once Ali demonstrated that there had been a misclassification by exhausting his administrative remedies, the City gave him the requested permit.

At trial, Judge Crispo, as the trier of fact, found as an historical fact that this delay was due to a misclassification of the property. Judge Crispo based his finding of a regulatory taking solely on the fact that the City had mistakenly misclassified the hotel. Judge Crispo, in ruling on Ali's cause of action for inverse condemnation found that: "The City's initial designation of the Ferraro as an SRO was erroneous. The SRO ordinance prevented the immediate demolition of the Ferraro. . . . " (App. 31).

He did not criticize the City for acting in bad faith or in an arbitrary manner. Indeed, Judge Crispo made the following findings about the character of the City's actions:

> "[T]he City's actions were not oppressive nor do they shock the conscience. While the actions of the City's employees were negligently performed, there is no credible evidence that they deliberately sought to deprive Mr. Ali of his due process rights. On the contrary, the court finds that they acted in good faith. Finally, the City's action, though misguided, was an attempt to further legitimate interests in protecting both its zoning integrity and the public." (App. 24-25)

Despite these findings of fact the California Court of Appeal held that " . . . the position taken by the City was

so unreasonable from a legal standpoint as to be arbitrary, not in furtherance of any legitimate governmental objective, and for no other purpose than to delay any development other than for an SRO hotel. Therefore the delay in demolition of the hotel was a temporary regulatory taking requiring compensation." (internal quotes omitted) (App. 13)

This finding is in direct conflict with that of the trier of fact. It appears to be the view of the California Court of Appeal that the obligation to provide just compensation can be triggered by governmental error even in the absence of any due process violations. Judge Crispo expressly found that the City acted in good faith in an attempt to protect both its zoning integrity and the public. Neither policy nor precedent support a finding that just compensation must be paid under such circumstances.

CONCLUSION

For these and all the above reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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